

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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January 12, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2010-462-M
v.	:	A.C. No. 36-00185-211813
	:	
LEHIGH CEMENT COMPANY	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 26, 2010, the Commission received from Lehigh Cement Company (“Lehigh”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Counsel for the operator states that Lehigh intended to contest the penalties contained on Proposed Assessment No. 000211813, but that counsel was unaware that the proposed assessment was among other materials forwarded to counsel by Lehigh. Because of this error, counsel inadvertently failed to timely contest the penalties on the operator's behalf, and the proposed assessment became a final Commission order. When the operator's counsel realized the mistake by reviewing the materials sent by Lehigh, the operator promptly sought reopening within 30 days of the assessment becoming a final order and before a notice of delinquency had been issued.

The Secretary opposed reopening of the proposed penalty arguing that inadequate or unreliable procedures and being extremely busy do not constitute sufficient grounds for reopening. The operator filed a response to the Secretary's opposition explaining at length the specific nature of the operator's claims and the prompt manner in which reopening was sought.

Having reviewed Lehigh's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. We base our decision to reopen on the promptness of the motion to reopen, the detailed explanation provided, as well as counsel's representation that he has initiated a review of case handling procedures so as to ensure that contest matters will be more carefully monitored in the future.<sup>1</sup> Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

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<sup>1</sup> We note that Lehigh also brought a motion to reopen based on similar circumstances in *Lehigh Cement Co.*, 32 FMSHRC 473, 474 (June 2010). We strongly caution counsel and the operator to take greater care to ensure that all penalty contests are timely and properly filed in the future.

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