

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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WASHINGTON, DC 20001

May 27, 2009

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

LAFARGE AGGREGATES  
SOUTHEAST, INC.

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Docket No. SE 2008-707-M  
A.C. No. 09-00023-139485

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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 August 26, 2008, the Commission received from Lafarge Aggregates Southeast, Inc. (“Lafarge”) a motion by counsel 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).

On February 12, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Penalty Assessment No. 000139485 to Lafarge, proposing a civil penalty for Citation No. 7794610, which arose from a May 2007 inspection. Lafarge subsequently received a letter dated May 7, 2008, from MSHA, informing Lafarge that the proposed penalty assessment had become a final order of the Commission. On May 21, 2008, the Commission received from Lafarge a request to reopen the final order. In its request, Lafarge stated that it intended to timely contest the proposed penalty but that it had failed to do so due to “administrative error.”

The Secretary responded that Lafarge’s conclusory assertion of the cause for its failure to timely file did not constitute a showing of the circumstances required to obtain reopening under

Federal Rules of Civil Procedure 60(b). She requested that the Commission provide the operator with an opportunity to satisfy the requirements for reopening. The Secretary stated that once the operator submitted a response, she would indicate whether she believed that reopening was warranted.

On July 25, 2008, we issued an order denying Lafarge's request without prejudice. *Lafarge Aggregates Southeast, Inc.*, 30 FMSHRC 633 (July 2008). We explained that Lafarge had failed to provide a sufficiently detailed explanation for its failure to contest the proposed penalty assessment, and that its conclusory statement that its failure to timely file was due to "administrative error" did not provide an adequate basis to justify reopening.

On August 26, 2008, the Commission received from Lafarge a second motion to reopen. In its request, the operator alleges that its safety manager did not receive the subject proposed penalty assessment, although he did receive two other proposed penalty assessments arising from the same May 2007 inspection. Lafarge explains that its intent to contest the subject proposed penalty is evident from its actions in timely contesting the two proposed penalty assessments that arose from the same inspection, participating in conferences with MSHA, and denying related allegations at issue in an MSHA special investigation. Lafarge's Safety Manager states that he mistakenly believed that MSHA was planning to modify Citation No. 7794610 and, as a result, he was not concerned by the significant amount of time that passed without notification by MSHA of a proposed penalty assessment. Lafarge concludes that the subject proposed penalty assessment must have been mistakenly misplaced or misdirected within its office.

The Secretary responds that, after reviewing Lafarge's explanation for its late filing, she does not oppose reopening the final order.

We have held 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).

Having reviewed Lafarge's motion to reopen 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. 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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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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