

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

October 28, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. SE 2009-173-M
	:	A.C. No. 31-01125-164541
OLDCASTLE STONE PRODUCTS	:	
	:	

BEFORE: Jordan, Chairman; Duffy, 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 December 18, 2008, the Commission received from Oldcastle Stone Products (“Oldcastle”) 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).

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).

On October 2, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment for 29 violations totaling \$32,026 to Oldcastle. Oldcastle states that the violations at issue in the proposed penalty assessment it seeks to reopen were issued between August 5 and August 14, 2008, and that it provided its counsel with a copy of the violations on September 3, 2008. Counsel filed a Notice of Contest of Citation No. 6105371, which has been docketed as SE 2008-992-RM and stayed before the Commission. Oldcastle claims that it received the proposed assessment on October 10, 2008, but that it did not realize that it needed to forward the assessment form to its counsel for a contest. It further explains that counsel became aware of the proposed assessment on December 11, 2008, when a state inspection revealed that the penalties were overdue.

The Secretary opposes reopening the proposed penalty assessment, maintaining that Oldcastle has failed to establish the existence of “exceptional circumstances.” Specifically, the Secretary contends that ignorance of the law and MSHA’s and the Commission’s procedural rules is not a permissible ground for reopening.

Oldcastle timely contested Citation No. 6105371, and the case has been docketed and stayed before a Commission administrative law judge pending issuance of the proposed penalty assessment by MSHA. Given these circumstances, it seems clear that Oldcastle intended to contest the proposed penalty for that citation. As to the remaining violations contained in the proposed assessment, the operator has neither demonstrated an intent to challenge those penalties nor provided an explanation for its failure to timely contest the proposed assessment, other than its general assertion of ignorance of the procedure.¹ Oldcastle’s failure to explain the delay in contesting the proposed penalties does not provide the Commission with an adequate basis to reopen the remaining penalties in the proposed assessment. *See, e.g., Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009).

¹ Oldcastle’s motion to reopen states at one point that “[a]ll underlying citations/orders captioned above have been contested.” Mot. at 2. However, in her opposition, the Secretary questions this statement and claims that “[t]he operator has furnished a copy of, and the Secretary is aware of, only one contest – the contest pertaining to Citation No. 6105371.” Opp’n at 3, n.1.

Having reviewed Oldcastle's request and the Secretary's response, in the interests of justice, we hereby reopen the penalty assessed for Citation No. 6105371 and remand the matter 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. 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. As to the remaining 28 penalties in Assessment No. 000164541, we deny without prejudice Oldcastle's request to reopen.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution:

Adele L. Abrams, Esq.
Law Office of Adele L. Abrams, P.C.
4740 Corridor Place, Suite D
Beltsville, MD 20705

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021