FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 14, 2009

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2009-293-M A.C. No. 22-00035-167206
OIL-DRI PRODUCTION COMPANY	:	

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 February 13, 2009, the Commission received a request to reopen a penalty assessment issued to Oil-Dri Production Company ("Oil-Dri") 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 October 29, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000167206 to Oil-Dri, proposing penalties for 12 citations that had been issued to Oil-Dri in July and August 2008. After receiving no response, MSHA sent Oil-Dri a delinquency notification on or around January 26, 2009, for the assessment. Oil-Dri states that it intended to contest six of the penalties and pay the other six penalties, but never received the assessment. In its request to reopen the case, Oil-Dri also expressly denies having received the assessment even though MSHA had notified it that the assessment was signed for by a particular Oil-Dri employee.

The Secretary states in her response that she does not oppose the reopening of the assessment, but also states that her records indicate that a specific Oil-Dri employee did sign for the assessment on November 3, 2008.

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).

In a case like this, in which the operator is seeking to contest only some of the penalties contained in an assessment, it is incumbent upon the operator to include in its request to the Commission to reopen not only the basis for reopening, but also the specific penalties it wishes to reopen. Because Oil-Dri has not done so in this case, we deny its request to reopen without prejudice.[1] Should Oil-Dri file a new or renewed request to reopen, it should specifically indicate which penalties it wishes to contest upon reopening and that it has paid the other penalties. Moreover, Oil-Dri should include an affidavit from the particular employee who MSHA alleges signed for the assessment regarding his knowledge of events with respect to the assessment.

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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

[1] The words "without prejudice" mean that Oil-Dri may submit another request to reopen the case so that it can contest the specific citations and penalty assessments.

Distribution:

Larry S. Evans, Safety Mngr.
Oil-Dri Production Company
P.O. Box 380
Ochlocknee, GA 31773

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