

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 28, 2009

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

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 February 13 and July 29, 2009, the Commission received from Oil-Dri Production Company (“Oil-Dri”) requests 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 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. In its first request to reopen, Oil-Dri stated that it intended to contest some of the penalties and pay the others, but had no record of having received the assessment, even though MSHA records indicate that it was signed for by a particular Oil-Dri employee. The Commission denied Oil-Dri’s request to reopen without prejudice, stating that if the operator chose to file a new or amended motion to reopen, it needed to specify which penalties it wished to contest upon reopening. See 31 FMSHRC ___, slip op. at 2 (July 14, 2009). The Commission further

instructed Oil-Dri to include an affidavit from the particular employee who MSHA alleges signed for the assessment regarding the employee's knowledge of the assessment. *Id.*

Oil-Dri filed a second request to reopen on July 29, 2009, specifying nine of the proposed penalties it wishes to contest upon reopening, and stating that it has paid the other three penalties. It also included with its second request the affidavit requested by the Commission, wherein the employee in question states that she signed for the package containing the assessment. She further explains that she would have placed any such package in the company's internal mail system, but she has no recollection of that particular package.

The Secretary did not oppose Oil-Dri's original request for reopening and did not respond to its second request.

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 Oil-Dri's requests 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.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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