FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

August 19, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2009-625-M
v.	:	A.C. No. 09-00961-168437
	:	
SOUTH RIDGE GRANITE QUARRY	:	

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 June 15, 2009, the Commission received a motion by counsel to reopen a penalty assessment issued to South Ridge Granite Quarry ("South Ridge") 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).

The Department of Labor's Mine Safety and Health Administration ("MSHA") issued South Ridge Assessment No. 000168437 on November 12, 2008, proposing a penalty for a single citation MSHA had issued to South Ridge two months earlier. According to South Ridge, November 12, 2008, was also the date it had held an informal conference with MSHA representatives regarding the citation. The operator states that it consequently concluded that it did not have to respond to the proposed assessment when it subsequently received it, nor to a later MSHA delinquency notice it received, and that the informal conference would eventually result in a formal hearing on the matter. South Ridge, which states that it had never before contested a penalty assessment, did not consult with its counsel on this matter until it received a Treasury Department notice regarding the assessment dated May 23, 2009. Counsel

subsequently filed the motion to reopen. The Secretary of Labor does not oppose the request to reopen.

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 South Ridge'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. 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.[1]

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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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[1] We grant reopening even though South Ridge, because of its confusion about the effect of the conference, did not move to reopen the assessment until nearly six months had passed since the assessment had become a final order. However, operators should be aware that, in general, a delay of such length decreases the likelihood that the Commission will look favorably upon a request to reopen.

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