

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 30, 2010

SECRETARY OF LABOR,	:	Docket No. SE 2010-151-M
MINE SAFETY AND HEALTH	:	A.C. No. 09-01108-193876
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2010-359-M
v.	:	A.C. No. 09-01164-196903
	:	
CARBO CERAMICS, INC.	:	Docket No. SE 2010-889-M
	:	A.C. No. 09-01164-200122

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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 November 18, 2009, the Commission received from Carbo Ceramics, Inc. (“Carbo”) a letter seeking to reopen a penalty assessment issued to the operator that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On January 12, 2010, the Commission received a request from Carbo seeking to reopen two more such assessments.<sup>1</sup>

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

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers SE 2010-151-M, SE 2010-359-M, and SE 2010-889-M, all captioned *Carbo Ceramics, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

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 August 11, 2009, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000193876 to Carbo for eight citations MSHA had previously issued to the operator. Carbo states in its November 18 request that it mailed the form indicating that it intended to contest three of the citations along with its payment of the other five penalties to MSHA’s St. Louis address for such payments, not to MSHA’s Civil Penalty Compliance Office as it should have. The Secretary of Labor does not oppose Carbo’s request to reopen, but urges the operator to make sure that it sends notices of contest to MSHA’s Civil Penalty Compliance Office in Arlington, VA.

In its January 12 request, Carbo states that it intended to contest four citations in Proposed Assessment No. 000196903, issued by MSHA on September 15, 2009, and one citation in Proposed Assessment No. 000200122, issued by MSHA on October 13, 2009, but that the assessment sheets marked for contest were not “included with the final payments that were sent to the Treasurer due to an Accounting Department oversight.” The Secretary opposes these requests to reopen on the ground that Carbo’s statement does not explain why the contests were not filed on a timely basis.

Having reviewed the facts and circumstances with respect to Proposed Assessment No. 000193876, the operator’s November 18 request, and the Secretary’s response, we hereby reopen the assessment 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.

With regard to the other two proposed penalty assessments, however, we conclude that the operator has not provided a sufficiently detailed explanation for its failures to timely contest the assessments. The operator’s statement that it failed to include its contests with the “final payments that were sent to the Treasurer due to an Accounting Department oversight” does not provide the Commission with an adequate basis to reopen without further elaboration regarding when these internal mistakes occurred, and how Carbo’s Treasurer and Accounting Department were involved in the operator’s process for filing notices of contest. Accordingly, we hereby deny without prejudice Carbo’s January 12 request as to the two assessments. *See Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC

569, 570 (July 2007). The words “without prejudice” mean Carbo may submit another request to reopen the cases so that it can contest the citations and penalty assessments.<sup>2</sup>

Any amended or renewed request by Carbo to reopen Assessment Nos. 000196903 and 000200122 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

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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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Patrick K. Nakamura, Commissioner

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<sup>2</sup> If Carbo submits another request to reopen, it must establish good cause for not contesting the citations and proposed assessments within 30 days from the date it received the proposed penalty assessments from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of “good cause” may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Carbo should include a full description of the facts supporting its claim of “good cause,” including how the mistake or other problem prevented Carbo from responding within the time limits provided in the Mine Act, as part of its request to reopen. Carbo should also include copies of all documents supporting its request to reopen.

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