

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 23, 2010

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

AGGREGATES USA LLC

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Docket No. SE 2010-258-M  
A.C. No. 09-00038-199644

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 December 9, 2009, the Commission received from Aggregates USA LLC (“Aggregates”) 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 August 31, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 6595211 to Aggregates, which timely contested it on September 2, 2009. Docket No. SE 2009-864-RM. On October 7, 2009, MSHA issued Proposed Assessment No. 000199644 to Aggregates, proposing civil penalties for several citations, including Citation 6595211. Aggregates maintains that it filled out the proposed assessment form indicating that it intended to challenge this citation and its associated penalty in the sum of \$100. Aggregates states that it sent its payment in the amount of \$1,409 for the remaining citations to MSHA's Payment Processing Center in St. Louis, Missouri, however its accounting office apparently failed to send the contest form to MSHA's Civil Penalty Compliance Office. The operator learned from MSHA's website that the citation had become a final order as of November 12, 2009.

The Secretary does not oppose Aggregates' request to reopen the proposed penalty assessment. She notes that a payment dated October 25, 2009, in the amount of \$1,409 was timely received at MSHA's Payment Processing Center. She also states that MSHA has no record of receiving the penalty contest form at its Civil Penalty Compliance Office in Arlington, Virginia.

Having reviewed Aggregates' 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.

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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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