

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

June 10, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. SE 2010-396-M
	:	A.C. No. 40-03223-196479
ROCKY POINT ROCK, INC.	:	
	:	

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 January 26, 2010, the Commission received from Rocky Point Rock, Inc. (“Rocky Point”) a request 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).

The Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000196479 to Rocky Point on September 9, 2009, for various citations. Rocky Points states that although MSHA's records reflect that it received the proposed assessment on September 14, 2009, the operator did not, in fact, receive Proposed Assessment No. 000196479 until October 13, when it was included in an envelope with Assessment No. 000199808. Rocky Point states that it returned both assessment forms to MSHA on October 19, 2009. The operator states that it subsequently received a delinquency notice from MSHA as to Proposed Assessment No. 000196479, informing it that the proposed assessment had become a final Commission order.

The Secretary does not oppose reopening the proposed penalty assessment. However, she acknowledges that MSHA's records reflect that the operator received Proposed Assessment No. 000196479 on September 14, 2009.<sup>1</sup>

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<sup>1</sup> It is not entirely clear from the record which proposed penalties Rocky Point wishes to contest. The citations listed on the cover of the operator's request to reopen do not correspond with all of the citations checked for contest on the proposed assessment form. In addition, the operator contends that it wishes to challenge penalties in the amount of \$3,088, but the penalties checked for contest total a sum of \$4,003.

Having reviewed Rocky Point's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Rocky Point's failure to timely contest the penalties and whether relief from the final order should be granted. If it is determined that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. § 2700.

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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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