

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

June 3, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE 2010-426-M
ADMINISTRATION (MSHA)	:	A.C. No. 40-00840-201713
	:	
v.	:	Docket No. SE 2010-427-M
	:	A.C. No. 40-00840-202198
CEMEX, 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 February 18, 2010, the Commission received from Cemex, Inc. (“Cemex”) motions made by counsel seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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.

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers SE 2010-426-M and SE 2010-427-M, both captioned *Cemex, Inc.*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

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 record indicates that the two assessments were issued by MSHA within a week of each other, and received at the Cemex plant in Knoxville, Tennessee, after that plant’s health and safety manager had left Cemex and before a successor had been hired. Consequently, the health and safety manager of another Cemex plant, after reviewing both assessments, tried to instruct Cemex staff in Knoxville that certain of the penalties on one of the assessments should be paid, while other penalties on both assessments should be contested. Cemex staff paid the penalties as instructed, but neglected to contest the remaining penalties on the two assessments. This error was discovered by the new Knoxville health and safety manager once delinquency notices from MSHA were received regarding the assessments, and the motions to reopen were filed soon thereafter.

The Secretary states that she does not oppose the reopening of the proposed penalty assessments so that Cemex can contest the unpaid penalties.

Having reviewed Cemex's requests and the Secretary's responses, 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

Patrick K. Nakamura, Commissioner

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