

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 14, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2010-820-M
v.	:	A.C. No. 54-00001-216737
	:	
CEMEX de PUERTO RICO	:	

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 June 1, 2010, the Commission received from Cemex de Puerto Rico (“Cemex”) a request 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 April 13, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment No. 000216737 to Cemex, proposing penalties for 11 citations issued to the operator. By a letter dated May 25, 2010, Cemex requests reopening so that it can contest two of the penalties. Cemex states that the company official to whom the assessment was directed was "out the company." The Secretary originally opposed reopening on the ground that Cemex's explanation was unclear regarding whether the official was out temporarily or permanently and did not address why another individual could not have filed the contest on a timely basis.

After seeking and obtaining Commission permission to file a late reply addressing the Secretary's concerns, Cemex explained that the assessment was received by Cemex and put on the official's desk in its unopened envelope because he was expected back soon from a business trip. He did not return as expected, however, as he instead took an unscheduled vacation and thus did not return until near the end of the 30-day period. His assistant did not realize that the envelope containing the assessment was of a time sensitive nature. Consequently, the assessment was not acted upon until after the official's return, at which point Cemex promptly filed its motion to reopen. In light of this explanation, the Secretary no longer opposes reopening of the assessment as to the two penalties.

Having reviewed Cemex's request 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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