

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 18, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-1103-M
	:	A.C. No. 35-00481-131566
v.	:	
	:	
DELTA SAND & GRAVEL CO.	:	

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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 March 3, 2009, the Commission received from Delta Sand & Gravel Co. (“Delta”) a second 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 inadvertence or mistake. *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 February 26, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Delta for two citations MSHA had issued to Delta in November 2007. Delta did not pay the assessment until it received a delinquency notice from MSHA. In its first motion, Delta requested reopening on the ground that the assessment was paid in error. According to Delta, the citations underlying the assessment were related to a fatal accident, and Delta had intended to contest the proposed penalties, as it later did in the case of another, much larger, assessment resulting from that accident. Delta stated that its payment of the penalties was due to office personnel not realizing the connection between the assessment and the accident.

While Delta's request for relief addressed the mistake that led to its failure to return the assessment form to MSHA, its motion was silent regarding why the assessment apparently sat unpaid for months, despite having purportedly been routed through Delta's payment process. Consequently, Delta's request to reopen was denied without prejudice. *Delta Sand & Gravel Co.*, 31 FMSHRC 4, 5 (Jan. 2009).<sup>1</sup>

In its second request to reopen, Delta states that the assessment was not paid until the delinquency notice was received from MSHA because the individual responsible for reviewing and paying assessments, Mark Slinker, died in the July 2007 fatal accident that led to the citations that are the subject of the assessment. According to Delta, it had yet to put new procedures in place when the assessment at issue was received.

The Secretary of Labor did not oppose Delta's first request to reopen and did not respond to the second request.

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<sup>1</sup> Commissioners Jordan and Cohen voted to deny Delta's original motion without prejudice, while Chairman Duffy and Commissioner Young would have remanded the case to the Chief Administrative Law Judge for a determination of good cause. The effect of the split decision was that the motion was denied without prejudice.

The fact that the proposed assessment was received seven months after the tragic death of Mr. Slinker but Delta had not yet adjusted its procedures to account for his absence suggests that Delta was not paying proper attention to its obligations under the statutory penalty assessment process. Nevertheless, given the circumstances of this case, including the fact that Delta had earlier indicated an intent to contest proposed penalties issued in connection with the fatal accident, 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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