

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 19, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2009-1003-M
v.	:	A.C. No. 45-03039-176249
	:	
PACIFIC ROCK PRODUCTS, LLC	:	

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 June 18, 2009, the Commission received from Pacific Rock Products, LLC (“Pacific Rock”) a motion by counsel 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 February 10, 2009, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued proposed penalty assessment No. 000176249 to Pacific Rock, for seven citations MSHA had issued to the operator the previous month. Pacific Rock states that it intended to contest the proposed penalties, but failed to do so as a result of “management changes” necessitated by economic conditions. The Secretary of Labor states that she does not oppose reopening the proposed assessment.

Having reviewed Pacific Rock’s request and the Secretary’s response, we conclude that Pacific Rock has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Pacific Rock’s statement that it failed to file a timely contest due to “management changes” made in its “Health and Safety Department for the Pacific Northwest” in late 2008 does not provide the Commission with an adequate basis to justify reopening an assessment that did not become a final order until March 19, 2009. Accordingly, we deny without prejudice Pacific Rock’s request. *See, e.g., Eastern Associated Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

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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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