

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

June 23, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 2009-1124-M
	:	A.C. No. 02-00135-181707
ASARCO, LLC	:	
	:	

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 July 20, 2009, the Commission received from Asarco, LLC (“Asarco”) 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).

Asarco states that it returned the assessment form to the Department of Labor's Mine Safety and Health Administration ("MSHA") with the citations that it desired to contest noted on the form, although Asarco does not provide the date on which it returned the form. On July 9, 2009, Asarco received a delinquency notice from MSHA. On July 15, 2009, the operator submitted its request to reopen to the Commission.

The Secretary does not oppose reopening the proposed penalty assessment but states that there is no record of the penalty contest form having been received by MSHA's Civil Penalty Compliance Office. The Secretary acknowledges that MSHA received a late payment with a check dated July 15, 2009, in the amount of \$28,197, to be applied to penalties in this case.

Having reviewed Asarco'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 Asarco's failure to timely contest the penalty and whether relief from the final order should be granted. As part of this determination, the Judge should ascertain when Asarco returned the proposed assessment form. 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.<sup>1</sup>

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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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<sup>1</sup> It is not clear which citations were paid and which citations Asarco seeks to reopen. Thus, if the Chief Administrative Law Judge determines that the case should be reopened, he should also determine which citations are to be included in the reopening.

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