

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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June 15, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2009-505-M
v.	:	A.C. No. 04-04075-171970
	:	
LEHIGH SOUTHWEST CEMENT	:	
COMPANY	:	

BEFORE: Duffy, Chairman; Jordan, 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 February 10, 2009, the Commission received a request to reopen a penalty assessment issued to Lehigh Southwest Cement Company (“Lehigh Southwest”) 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).

On December 18, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued proposed penalty Assessment No. 000171970 to Lehigh Southwest. The operator’s request to reopen does not address any attempt on its part to file a contest with MSHA or to pay any of the 22 penalties proposed by the assessment. Rather, Lehigh Southwest filed with the Commission a contest form marked to indicate its intent to contest eight of the penalties, and a letter it previously filed with MSHA contesting, shortly after their issuance, the eight citations associated with those penalties, and a ninth citation for which a penalty is not included in Assessment No. 000171970.

In response, the Secretary states that the request to reopen is deficient in that it includes no explanation for why the contest form was not timely filed, and thus the request should be denied.

We have held 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).

Because Lehigh Southwest's request for relief does not explain the company's failure to contest the proposed assessment on a timely basis, and is not based on any of the grounds for relief set forth in Rule 60(b), we hereby deny the request for relief without prejudice. *See FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007). The words "without prejudice" mean that Lehigh Southwest may submit another request to reopen the assessment.¹

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

¹ If Lehigh Southwest submits another request to reopen, it must establish good cause for not contesting the eight citations and proposed penalties within 30 days from the date it received the assessment from MSHA, and state that it has paid the other 14 penalties. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Lehigh Southwest should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. Lehigh Southwest should also submit copies of supporting documents with its request to reopen.

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