

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
SUITE 9500  
WASHINGTON, DC 20001

November 16, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2010-1074-M
	:	A.C. No. 35-00497-191325
v.	:	
	:	Docket No. WEST 2011-72-M
	:	A.C. No. 35-00497-177107
PARKER-NORTHWEST PAVING	:	
COMPANY	:	

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 April 20, 2010, the Commission received a request to reopen two penalty assessments issued to Parker-Northwest Paving Company (“Parker”) that became final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup>

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

---

<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2010-1074-M and WEST 2011-72-M, both captioned *Parker-Northwest Paving Co.*, and involving similar factual and procedural issues. 29 C.F.R. § 2700.12.

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 18, and July 15, 2009, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment Nos. 000177107 and 000191325, respectively, to Parker, proposing civil penalties for numerous citations. In its letter seeking reopening, Parker apologizes for “being negligent in the handling of the citations that we wished to contest and not following the correct MSHA procedures.”

The Secretary opposes Parker’s request to reopen both assessments. As to Assessment No. 000177107, she maintains that Parker did not seek reopening until April 20, 2010, over one year after the proposed assessment became a final order of the Commission on March 27, 2009. The Secretary argues that because the reopening request was filed more than one year after the penalty assessment became a final order, it should be denied. As to Assessment No. 000191325, she asserts that Parker’s explanation lacks sufficient detail as to why it failed to timely contest the assessments and therefore does not provide adequate grounds for reopening. The Secretary also notes that a delinquency notice was sent to the operator on October 8, 2009, but the operator waited more than six months to seek reopening.

Having reviewed Parker’s request to reopen and the Secretary’s responses thereto, we agree that Parker has failed to provide a sufficient basis for the Commission to reopen the penalty assessments. With respect to Assessment No. 000177107, which, according to MSHA’s records, was delivered on February 25, 2009, and became a final order on March 27, 2009, more than a year passed before the operator sought reopening with the Commission. Under Rule 60(b), any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered. Fed. R. Civ. P. 60(b). The Commission denies requests for reopening that are brought more than a year after the order has become final. *JS Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, we deny with prejudice the request to reopen Assessment No. 000177107.

As to Assessment No.000191325, Parker has failed to adequately explain its failure to timely contest the proposed assessments. Furthermore, Parker has failed to explain the circumstances surrounding its receipt of the October delinquency notice.<sup>2</sup> Accordingly, we

---

<sup>2</sup> In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator’s receipt of a delinquency notice and the operator’s filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009).

hereby deny without prejudice Parker's request to reopen Assessment No. 000191325. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that Parker may submit another request to reopen Assessment No. 000191325.<sup>3</sup> Any amended or renewed request by Parker to reopen this assessment must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.

---

Mary Lu Jordan, Chairman

---

Michael F. Duffy, Commissioner

---

Michael G. Young, Commissioner

---

Robert F. Cohen, Jr., Commissioner

---

Patrick K. Nakamura, Commissioner

---

<sup>3</sup> If Parker submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment from MSHA. 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. Parker 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. Parker should also submit copies of supporting documents with its request to reopen and specify which proposed penalties it is contesting. Parker should further explain in similar detail why it delayed in responding to MSHA's delinquency notice.

Distribution:

Duane Johnson  
Parker-Northwest Paving Co.  
24370 S. Hwy., 99E  
Canby, OR 97013

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
1100 Wilson Blvd., Room 2220  
Arlington, VA 22209-2296

Melanie Garris, Acting Chief  
Office of Civil Penalty Compliance, MSHA  
U.S. Dept. of Labor  
1100 Wilson Blvd., 25<sup>th</sup> Floor  
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001-2021