

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

August 31, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2010-149-M
ADMINISTRATION (MSHA)	:	A.C. No. 24-02265-196647
	:	
v.	:	Docket No. WEST 2010-150-M
	:	A.C. No. 24-02386-196648
E.S. STONE AND STRUCTURE, INC.	:	

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 November 2, 2009, the Commission received from E.S. Stone and Structure, Inc. (“E.S. Stone”) two motions by counsel to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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.

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2010-149-M and WEST 2010-150-M, both captioned *E.S. Stone and Structure, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

E.S. Stone seeks to reopen Proposed Assessment Nos. 000196647 and 000196648, each issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) on September 10, 2009. The operator states that, in July 2009, when it received from MSHA the 21 citations at issue in the two assessments, it immediately faxed the citations to counsel, expecting them to be contested. It further states that, consequently, when it received the two assessments, it did not believe it had the additional obligation to contest the proposed penalties. The failure to file any contests was discovered in late October 2009, and the motions to reopen were filed soon thereafter. The Secretary of Labor states that she does not oppose the motions.

Having reviewed E.S. Stone’s requests and the Secretary’s responses, we conclude that E.S. Stone has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments. Its motions explain that the citations were faxed to counsel, but do not address why counsel never contested the citations as the operator expected. They also do not explain what happened to the proposed assessment forms when they were received by E.S. Stone. Accordingly, we deny without prejudice E.S. Stone’s requests. See, e.g., *Eastern Assoc. Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

Any amended or renewed request by E.S. Stone to reopen the two assessments must be filed within 30 days of the date 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

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