FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December 14, 2010

SECRETARY OF LABOR,	:	Docket No. WEST 2010-1646-M
MINE SAFETY AND HEALTH	:	A.C. No. 10-02141-208356
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2010-1914-M
v.	:	A.C. No. 10-02141-179350
	:	
QUALITY SAND & GRAVEL	:	

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 August 6, 2010, and September 27, 2010, the Commission received from Quality Sand & Gravel ("Quality") requests to reopen two 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 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

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[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2010-1646-M and WEST 2010-1914-M, both captioned *Quality Sand & Gravel*, and involving similar factual and procedural issues. 29 C.F.R. § 2700.12.

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 March 17, 2009, and January 12, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment Nos. 000179350 and 000208356, respectively, to Quality. In its request to reopen Proposed Assessment No. 000179350, Quality states that it is under new management and that it only learned recently that MSHA did not receive its contest. Quality also asserts that it never received a delinquency letter covering the assessment. The Secretary opposes Quality's request to reopen because it was filed more than one year and five months after the proposed assessment became a final order of the Commission. She also notes that the assessment was sent to the Treasury Department for collection on October 15, 2009.

In its request to reopen Assessment No. 000208356, Quality alleges that shortly after the citations contained in the assessment were issued in November 2009, it sent a letter to the MSHA district office, disputing all 12 violations. Quality also asserts that it sent a letter to MSHA on February 9, 2010, within the 30-day contest period, informing MSHA of its dispute regarding the 12 violations. Quality also attaches a letter to MSHA dated April 16, 2010, inquiring as to the status of its dispute of these violations. The Secretary states that she does not oppose Quality's request to reopen Assessment No. 000208356.

Having reviewed the facts and circumstances of these proceedings, the operator's requests and the Secretary's responses, we agree that Quality has failed to provide a sufficient basis for the Commission to reopen Assessment No. 000179350, but has provided a sufficient basis for reopening with respect to Assessment No. 000208356.

Proposed Assessment No. 000179350 became a final order of the Commission on April 23, 2009, and more than a year passed before the operator sought reopening with the Commission on September 27, 2010. In fact, we note that the reopening request was submitted almost a year after the matter had been referred for collection with the Treasury Department. 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 generally denies requests for reopening that are brought more than a year after the order has become final. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, we deny the request to reopen Assessment No. 000179350.[2]

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[2] We are mindful of Quality's concern with the amount of the penalty and its effect on business. We note that MSHA's Civil Penalty Compliance Office may be able to arrange an installment repayment plan if an operator is unable to pay this debt all at one time. *See*

With respect to Assessment No. 000208356, we grant the request to reopen the assessment and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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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

Delinquency Letter dated June 10, 2009.

Distribution:

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