

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

September 1, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2010-671-M
v.	:	A.C. No. 02-02867-191421
	:	
ARIZONA MATERIALS	:	

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 February 18, 2010, the Commission received from Arizona Materials (“AM”) 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).

On July 16, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000191421 to AM, proposing penalties for five citations that had been issued to the operator two months earlier. According to AM, it understood that a former safety manager had faxed the contest form to MSHA, but MSHA shows no record of receipt of the contest, and informed AM that such a method of contest is contrary to the directions contained on the assessment.

The Secretary opposes the request on the ground that AM's explanation for the failure to file a timely contest is conclusory and thus insufficient to establish grounds for reopening the assessment. The Secretary also states that AM has failed to explain why it did not respond more quickly to an October 8, 2009, delinquency notice, but instead waited until after MSHA had referred the matter to the U.S. Treasury before it made its request to reopen.

Having reviewed AM's request to reopen and the Secretary's response, we conclude that the operator has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Without further elaboration, the operator's explanation has not provided the Commission with an adequate basis to reopen. Accordingly, we hereby deny the request for relief without prejudice. *See Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007). The words "without prejudice" mean that AM may submit another request to reopen Assessment No. 000191421 so that it can contest the two proposed penalties.

At a minimum, the operator must provide the date on which the former official responsible for this matter left the company, the name of the individual who took over the responsibility for the contest of penalties, and explain why it has an understanding that its former Environmental Health and Safety Manager faxed a request to contest the citations to MSHA, and why AM did not file a motion to reopen as soon as it was alerted to the delinquency by the MSHA delinquency notice dated October 8, 2009. AM should also obtain an affidavit from the former Environmental Health and Safety Manager or explain why it cannot obtain such an affidavit. Any amended or renewed request by AM to reopen Assessment No. 000191421 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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