

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

February 17, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2011-124-M
v.	:	A.C. No. 10-02105-208355
	:	
ROWDY CRUSHING, 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 October 19, 2010, the Commission received a letter requesting that the Commission reopen a penalty assessment issued to Rowdy Crushing, Inc. (“Rowdy”) 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).

Rowdy requests reopening of Proposed Assessment No. 000208355, dated January 12, 2010, because it never received the proposed assessment. It also states that it has been contacted by a collection agency with regard to the penalties involved.

According to the Secretary, the proposed assessment and a subsequent delinquency notice were returned undelivered from the address of record that the Department of Labor's Mine Safety and Health Administration ("MSHA") has had for Rowdy since early 2007. The Secretary does not oppose reopening, but states that it is the operator's responsibility to keep its address of record current with the MSHA district office.

Rowdy explains that it filed a change of address with MSHA's Boise office. That office, however, is an MSHA field office, not an MSHA district office. Rowdy should ensure that its current address is on file with the MSHA district office for Idaho, which is in Vacaville, California.

Having reviewed Rowdy's request and the Secretary's response, in the interests of justice, we hereby reopen this matter 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. § 2700.28.¹

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

¹ The request to reopen was filed by Troy Thurgood of Thurgood Business Services, LLC. Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall into one of the categories in Rule 3(b), which include parties, representatives of miners, an “owner, partner, officer or employee” of certain parties, or “[a]ny other person with the permission of the presiding judge or the Commission.” 29 C.F.R. § 2700.3(b). It is unclear whether Mr. Thurgood satisfied the requirements of Rule 3 when he filed the operator’s request. We have determined that, despite this, we will consider the merits of the operator’s request in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, Mr. Thurgood must demonstrate to the Commission or presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seek permission to practice before the Commission or judge pursuant to Rule 3(b)(4).

Distribution:

Troy Thurgood
Rowdy Crushing, Inc.
P.O. Box 328
St. Anthony, ID 83455

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

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th 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