

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 20, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2009-83-M
v.	:	A.C. No. 30-00070-140110
	:	
LEHIGH NORTHEAST CEMENT	:	
COMPANY	:	

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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 6, 2009, the Commission received a motion by counsel to reopen a penalty assessment issued to Lehigh Northeast Cement Company (“Lehigh Northeast”) 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).

Lehigh Northeast states that in December 2007 the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued it 28 citations, all of which were designated as involving high negligence. Lehigh Northeast explains that it requested and was granted a conference with MSHA on the citations. Lehigh Northeast states that it was eventually told by MSHA that the changes it requested would be made, and that it learned that a neighboring operator had been successful as well in reducing negligence findings on similar citations it had been issued.

However, MSHA subsequently issued Assessment No. 000140110 to Lehigh Northeast, proposing penalties for the 28 citations based on the high negligence allegations. Lehigh Northeast states it was under the impression that revised proposed penalties would issue, based on the reduction in negligence, but that turned out not to be the case. Lehigh Northeast, now represented by new counsel, subsequently learned that the MSHA database showed the continued delinquency of the assessment and directed that the motion for reopening be filed. After initially opposing Lehigh Northeast's request to reopen, the Secretary subsequently filed a response stating that she does not oppose reopening here.

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 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).

Having reviewed Lehigh Northeast's request and the Secretary's response, we conclude that, on balance, this case merits reopening. Lehigh Northeast clearly showed an intent to contest proposed penalties predicated on allegations of high negligence, and was apparently told by MSHA that the citations would be changed to show a lesser degree of negligence. Given that, it is understandable why Lehigh Northeast believed that it was unnecessary to contest the initial proposed assessment.¹

¹ We grant reopening even though Lehigh Northeast did not move to reopen the assessment until over ten months had passed since the assessment had become a final order. Operators should be aware that, in general, a delay of such length decreases the likelihood that the Commission will look favorably upon a request to reopen. In this case we are willing to grant reopening because it appears that MSHA has concluded that the original citations were incorrect as to the degree of negligence, which would necessarily reduce the amount of the penalties.

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.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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