

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 14, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2010-309-M
v.	:	A.C. No. 17-00692-201858
	:	
P & K SAND & GRAVEL, 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 July 26, 2010, the Commission received from P & K Sand & Gravel, Inc. (“P & K”) a letter from the company’s president seeking 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 November 4, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000201858 to P & K. P & K contends that it did not understand its contest rights and the significance of an unwarrantable failure designation at the time of the inspection and that the inspector had not explained MSHA's contest procedures. It asserts that it is a small, family-owned business and thought it had done what was necessary to contest the penalty. P & K provided the following timeline of events in support of its request to reopen: On December 7, 2009, shortly after receiving the proposed assessment, it sent a letter to MSHA's District Office in Warrendale, Pennsylvania, raising concerns about its ability to pay. In early February 2010, shortly after receiving MSHA's delinquency notice in late January, it sent a letter to MSHA's Civil Penalty payment office in St. Louis with a copy of the letter it sent to MSHA's District Office. In early June 2010, shortly after receiving an invoice from the Treasury Department in late May, it responded to the Treasury Department and provided copies of its correspondences to MSHA. In late June 2010, it sent a letter to the Department of Labor's Regional Solicitor in Boston. It appears that this letter was forwarded to the Appellate Counsel for Mine Safety and Health in the Solicitor's Office, who responded in mid-July. The operator subsequently filed its request to reopen about two weeks later.

The Secretary of Labor states that she does not oppose the request to reopen the assessment. She notes that P & K's February 2010 correspondence to MSHA was sent to its St. Louis office, and not its Civil Penalty Compliance Office in Arlington, Virginia. She also states that the proposed assessment form provides clear instructions to the operator on how to file a contest of the assessment.

Although P & K failed to follow the instructions on the proposed penalty assessment form and did not file a contest of the proposed assessment with MSHA's Civil Penalty Compliance Office in Arlington, VA, the operator did send timely correspondence to MSHA. Moreover, after receiving guidance from the Solicitor's Office, P & K promptly filed a request to reopen. Given the operator's numerous attempts to challenge the proposed assessment and its apparent inexperience with Commission procedures, we conclude that under the circumstances in this case, the operator has established good cause for reopening.

Having reviewed the facts and circumstances of this case, P & K's request, and the Secretary's response, 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.

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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