

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 7, 2008

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| SECRETARY OF LABOR, | : | Docket No. LAKE 2008-349-M |
| MINE SAFETY AND HEALTH | : | A.C. No. 47-03165-140238 |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| v. | : | Docket No. LAKE 2008-350-M |
| | : | A.C. No. 47-03191-140239 |
| | : | |
| NORTHERN LAKES CONCRETE, INC. | : | Docket No. LAKE 2008-351-M |
| | : | A.C. No. 47-03330-140242 |

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. (2000) (“Mine Act”).¹ On April 14, 2008, the Commission received from Northern Lakes Concrete, Inc. (“Northern Lakes”) motions by counsel seeking to reopen three 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).

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).

On February 13, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued three proposed penalty assessments to Northern Lakes for Citations Nos. 6188577, 6188578, 6189190, 6189191, and 6189192. Northern Lakes asserts that it had previously contested all of the underlying citations. The affidavit of Northern Lakes’ Safety Director states that it failed to contest the penalty assessments within the required 30 days “due to

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers LAKE 2008-349-M, LAKE 2008-350-M, and LAKE 2008-351-M, all captioned *Northern Lakes Concrete, Inc.* and involving similar procedural issues. 29 C.F.R. § 2700.12.

mistake and inadvertent administrative error due to a clerical error which failed to bring the assessment to [his] attention in a timely fashion.” The Secretary states that she does not oppose the reopening of the assessments.

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 inadvertence or mistake. *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 Northern Lake’s request, we determine that Northern Lakes has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments. Northern Lakes’ conclusory statement that a clerical error resulted in its failing to timely contest the assessments does not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny without prejudice Northern Lakes’s request. *See Eastern Assoc. Coal, LLC*, 30 FMSHRC 392 (May 2008); *James Hamilton Construction*, 29 FMSHRC 569, 570 (July 2007).²

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

² In the event Northern Lakes chooses to refile its request to reopen, it should disclose with specificity its grounds for relief.

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