

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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April 4, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. PENN 2008-98-M
	:	A.C. No. 36-00165-125280
v.	:	
	:	
CEMEX, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, 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”). On November 30, 2007, the Commission received from Cemex, Inc. (“Cemex”) a motion made by counsel 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).

In June 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued citations to Cemex. On August 31, 2007, Cemex received a proposed assessment as a result of the citations that previously had been issued. Cemex states that the proposed assessment was addressed to its plant manager, who forwarded the assessment to its safety director. Cemex further states that its safety director was out of the office on travel during most of August, September, and October and that he was unaware of the assessment until sometime in October 2007. Cemex’s safety director then sent a request for a hearing on the

proposed penalties, which MSHA denied because the request was untimely. The Secretary states that she does not oppose Cemex's request to reopen the proposed penalty assessment.¹

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).

¹ In the letter in which she states that she does not oppose the reopening of the penalty assessment, the Secretary requests that Cemex clarify which of the proposed penalties and associated citations are to be reopened because Cemex checked only one penalty on the assessment form but, in addition, also checked a box on the form indicating that it wanted to contest all violations.

Having reviewed Cemex's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Cemex's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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