

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

February 5, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2008-546-M
v.	:	A.C. No. 09-00815-126587
	:	
STANDARD SAND &	:	
SILICA 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 April 2, 2008 and May 8, 2008, the Commission received letters from Standard Sand & Silica Company (“Standard Sand”) 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).

On September 5, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment to Standard Sand. On December 6, 2007, MSHA apparently sent a notice to Standard Sand indicating that the penalty had become delinquent and payment was due. In its first letter to the Commission, dated March 28, 2008, Standard Sand’s Safety Services Manager asserts that the operator “originally contested the citation in late October by sending in the Proposed Assessment Case Number: 000126587.” Attached to this letter is a copy of the proposed assessment with the notation “Rec’d 9/12/07” and the initials of the Safety Services Manager. In his second letter to the Commission, dated May 5, 2008, the Safety Services Manager states that in late October he “forwarded the original Proposed Assessment – Case Number 000126587 to Standard Sand &

Silica's accounts payable department with the Check for Contest box checked to be sent in as proper procedure.”

Standard Sand further states that it never received MSHA's delinquency notice. It claims that the first time it learned that the assessment had not been contested was on March 28, 2008, when it received a collection notice from the Department of Treasury. On the same day, Standard Sand sent its initial letter to the Commission requesting reopening.

The Secretary states that although she does not oppose the reopening of the assessment, MSHA has no record of receiving the penalty contest form.

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 Standard Sand's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge. On remand, the judge should determine whether Standard Sand mailed its contest to MSHA, and if so, whether it did so prior to the 30-day deadline set forth in section 105(a). If the judge finds that the assessment was not timely contested, he should determine whether good cause exists for Standard Sand's failure to timely contest the penalty proposal and whether relief from the final order should be granted.¹ 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

Robert F. Cohen, Jr., Commissioner

¹ The judge should specifically determine what Standard Sand actually did to allegedly contest the proposed penalty assessment and when it did so. If Standard Sand failed to meet the 30-day deadline, it should provide reasons to the judge as to why its neglect is excusable.

Distribution:

Gordan J. Broadhead, Safety Services Mngr.
Standard Sand & Silica, Inc.
1850 Hgwy. 17/92 North
P.O. Box 1059
Davenport, FL 33836-1059

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

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2247

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