

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

July 25, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. SE 2008-707-M
	:	A.C. No. 09-00023-139485
LAFARGE AGGREGATES	:	
SOUTHEAST, INC.	:	

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”). On May 21, 2008, the Commission received from Lafarge Aggregates Southeast, Inc. (“Lafarge”) a motion by counsel 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 February 12, 2008, the Department of Labor’s Mine Safety and Health Administration issued Proposed Penalty Assessment No. 000139485 to Lafarge, proposing a civil penalty for Citation No. 7794610. In its request, Lafarge states that it intended to timely contest the proposed penalty but that it failed to do so due to “administrative error.”

The Secretary states that Lafarge’s conclusory assertion of the cause for its failure to timely file does not constitute a showing of the circumstances required to obtain reopening under Fed. R. Civ. P. 60(b). She requests that the Commission provide the operator with an opportunity to satisfy the requirements for reopening. The Secretary states that once the operator submits a response, she will indicate whether she believes that reopening is warranted.

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 Lafarge’s motion to reopen and the Secretary’s response thereto, we agree with the Secretary that Lafarge has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Lafarge’s conclusory statement that its failure to timely file was due to “administrative error” does not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny without prejudice Lafarge’s request. *See, e.g., Eastern Associated Coal, LLC*, 30 FMSHRC \_\_\_, slip op. at 2, No. WEVA 2008-488 (May 16, 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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