

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

October 4, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2004-405-M
	:	A.C. No. 45-03490-27068
v.	:	
	:	Docket No. WEST 2004-406-M
AJ CRUSHING & CONCRETE, LLC.	:	A.C. No. 45-03490-24530

BEFORE: Duffy, Chairman; Jordan, Suboleski, 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. (1994) (“Mine Act”).<sup>1</sup> On July 19, 2004, the Commission received from AJ Crushing & Concrete, LLC. (“AJ Crushing”) correspondence which we construe as a motion to reopen two 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).

The Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued two proposed assessments (A.C. No. 45-03490-27068 and A.C. No. 45-03490-24530) to AJ Crushing. In its motion, AJ Crushing states that the 30 days to contest the proposed assessments has passed and it asks the Commission to waive the 30 day period and review the assessments. Mot. No documentation is attached to AJ Crushing’s motion. The Commission received a

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2004-405-M and WEST 2004-406-M, both captioned *AJ Crushing & Concrete, LLC.* and both involving similar issues. 29 C.F.R. § 2700.12.

response from the Secretary of Labor stating that, because AJ Crushing has identified no grounds for reopening the penalty assessments, she requires additional information before she can express her position on the operator's motion. Sec'y Resp. at 1-2.

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).

On the basis of the present record, we are unable to evaluate the merits of AJ Crushing's position. We hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for AJ Crushing's failure to timely contest the penalty proposals and whether relief from the final orders 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.

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

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