

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

February 2, 2009

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

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Docket No. WEST 2008-1548-M
A.C. No. 35-01041-158346

v.

FREEMAN ROCK, 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. (2006) (“Mine Act”). On September 16, 2008, the Commission received from Freeman Rock, Inc. (“Freeman”) a letter seeking to reopen 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 July 29, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Penalty Assessment No. 000158346 to Freeman for seven citations. On September 16, 2008, Freeman filed a request to reopen this proposed assessment, stating that it is contesting the proposed assessment on the basis that it was not notified of unspecified changes in procedures at MSHA’s Albany Field Office. It further alleges that it had been building its defense in this case during a busy season and did not realize that the time to contest had passed.

The Secretary responds that the operator’s request for reopening should be denied. She states that the circumstances as stated by the operator, that the operator was not notified of changes in procedures at MSHA’s field office and that it did not realize that it was out of time, do not qualify as circumstances that warrant reopening under Rule 60(b) of the Federal Rules of Civil Procedure.

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) 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.

Having reviewed Freeman’s request to reopen and the Secretary’s response, we agree with the Secretary that, as its allegations are currently stated, Freeman has failed to show circumstances that warrant reopening the proposed penalty assessment. It is unclear from Freeman’s statements what alleged changes in the procedures at MSHA’s Albany Field Office Freeman is referring to, whether the alleged changes affected Freeman’s ability to timely contest the proposed penalty assessment, and, if so, what that effect was.

Accordingly, we deny without prejudice Freeman’s request. *See, e.g., Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007). The words “without prejudice” mean that Freeman may submit another request to reopen the case so that it can contest the citations and penalty assessments.¹

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

¹ If Freeman submits another request to reopen the case, it must identify the specific citations and assessments it seeks to contest. Freeman must also establish good cause for not contesting the citations and proposed assessments within 30 days from the date it received the proposed penalty assessments from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of “good cause” may be shown by a number of different factors including mistake, inadvertence, surprise or excusable fault on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation or other misconduct by the adverse party. Freeman should include a full description of the facts supporting its claim of “good cause,” including how the mistake or other problem prevented Freeman from responding within the time limits provided in the Mine Act, as part of its request to reopen the case. In addition, Freeman should submit copies of supporting documents with its request to reopen the case.

Distribution:

Ted Freeman, Jr.
Freeman Rock, Inc.
P.O. Box 1218
Brookings, OR 97415

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., 25th Floor
Arlington, VA 22209-3939

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