

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 20, 2010

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

v.

HIGGINS STONE COMPANY, INC.

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Docket No. CENT 2009-179-M
A.C. No. 14-01650-156893

BEFORE: Jordan, Chairman; Duffy, 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 December 29, 2008, the Commission received from Higgins Stone Company (“Higgins”) a letter 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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

In its letter, Higgins asserts that the proposed assessment was lost when it moved its office to a new city. However, Higgins does not indicate when the move took place or provide any details regarding its handling of the proposed assessment. In addition, Higgins does not indicate which of the 16 violations contained in the assessment it seeks to contest.

The Secretary states that although she does not oppose the reopening of the proposed penalty assessment, she urges that Higgins take all “steps necessary to ensure that future penalty assessments it wishes to contest are processed in a timely manner,” including ensuring that “the operator’s address of record is accurate for any future notification of proposed assessments.”

Having reviewed Higgins’ request and the Secretary’s response, we conclude that Higgins has failed to provide an adequate basis for the Commission to reopen the proposed penalty assessment. Higgins has failed to substantiate its proffered justification for its delays in responding to the proposed assessment and does not specify which violations it wishes to contest. An operator seeking to reopen a proceeding after a final order is effective bears the burden of establishing an entitlement to extraordinary relief. At a minimum, the applicant for such relief must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator’s knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure. The operator must also identify which specific citations or orders in the assessment it wishes to contest upon reopening. Affidavits from persons involved in and knowledgeable of the situation and pertinent documents should be included with the request to reopen.

Accordingly, we hereby deny without prejudice Higgin's request. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that Higgins may submit another request to reopen the assessment so that it can contest the penalty assessment.¹

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

¹ Higgins should include in another request a full description of the facts supporting its explanation, including (1) the date it moved its office; (2) how it initially handled the proposed assessment; and (3) how quickly it acted upon receiving the November 3, 2008 delinquency notice. Higgins should also confirm that it has notified MSHA of its new address.

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