

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 13, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2010-50-M
v.	:	A.C. No. 23-00028-191940 CKP
	:	
ALLGEIER MARTIN &	:	
ASSOCIATES, INC.	:	

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 October 20, 2009, the Commission received from Carthage Crushed Limestone (“Carthage”) a request to reopen a penalty assessment issued to Carthage’s contractor, Allgeier Martin & Associates, Inc. (“Allgeier”) 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).

The Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000191940 to Allgeier on July 22, 2009, proposing penalties for a citation and an order that had previously been issued to Allgeier. The contest form received by MSHA indicated that the penalty for the citation was being contested, but not the penalty for the order. The request to reopen indicates that Allgeier intended to contest both penalties, but apparently failed to indicate this on the form that was submitted to MSHA by Carthage. The motion to reopen was filed immediately after an MSHA delinquency notice was received for the uncontested penalty. The Secretary of Labor does not oppose reopening.

Having reviewed the request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.<sup>1</sup>

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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<sup>1</sup> The request to reopen was filed by Jack Slates, who identifies himself as a Environmental Safety & Health Engineer with Carthage. Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall into one of the categories in Rule 3(b), which include parties, representatives of miners, an "owner, partner, officer or employee" of certain parties, or "[a]ny other person with the permission of the presiding judge or the Commission." 29 C.F.R. § 2700.3(b). Carthage is not a party in this proceeding, and it is unclear whether Mr. Slates satisfied the requirements of Rule 3 when he filed the request on behalf of Allgeier. We have determined that, despite this, we will consider the merits of the request in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, Allgeier must be represented by its owner, partner, officer, or employee, or Mr. Slates must demonstrate to the Commission or presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seek permission to practice before the Commission or judge pursuant to Rule 3(b)(4).

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