

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

June 23, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2010-301-M
v.	:	A.C. No. 33-04447-193672
	:	
CITY STONE, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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 30, 2009, the Commission received a request to reopen a penalty assessment issued to City Stone, LLC (“City Stone”) 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).

On August 6, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000193672 to City Stone, proposing penalties for various citations. City Stone states that it "did not realize that the necessary paperwork to contest the citations had not been filed with MSHA" until it received a delinquency notice from MSHA dated October 28, 2009.¹

The Secretary opposes reopening on the ground that City Stone has failed to make a showing of the exceptional circumstances that warrant reopening. The Secretary argues that specific instructions on how to contest the proposed assessment appeared on the proposed assessment form, and that there is no explanation as to why the operator did not contest the proposed assessment within 30 days after receipt.

Having reviewed City Stone's request to reopen and the Secretary's response, we conclude that the operator has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. The statement that the operator did not realize that the necessary paperwork had not been filed does not provide the Commission with an adequate basis to reopen without further elaboration. Furthermore, City Stone has failed to explain why it delayed approximately two months in responding to the delinquency notice sent by MSHA.² Accordingly, we hereby deny without prejudice City Stone's request. *See Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009); *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394

¹ The request to reopen was filed by James Young, of Catamount Consulting, who identifies himself as a representative for City Stone. 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 includes 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). It is unclear whether Mr. Young satisfied the requirements of Rule 3 when he filed the request on behalf of City Stone. 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, Mr. Young may represent City Stone only if he demonstrates to the Commission or the presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seeks permission to practice before the Commission or the judge pursuant to Rule 3(b)(4). Otherwise, City Stone must be represented by an attorney or by an owner, partner, officer, or employee.

² In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 10-11 (Jan. 2009).

(May 2008). The words “without prejudice” mean City Stone may submit another request to reopen the case so that it can contest the citations and penalty assessment.³

Any amended or renewed request by City Stone to reopen Assessment No. 000193672 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

³ If City Stone submits another request to reopen the case, it must establish good cause for not contesting the citations and proposed assessment within 30 days from the date it received the proposed penalty assessment 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 neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. City Stone should include a full description of the facts supporting its claim of “good cause,” including how the mistake or other problem prevented City Stone from responding within the time limits provided in the Mine Act, as part of its request to reopen the case. City Stone should also include copies of all documents supporting its request to reopen the case.

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