

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 1, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-336-M
	:	A.C. No. 45-03455-126242
v.	:	
	:	
WASHINGTON ROCK QUARRIES, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners<sup>1</sup>

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On January 16, 2008, the Commission received from Washington Rock Quarries, Inc. (“Washington Rock”) a motion 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).

Washington Rock states that from December 2006 through March 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued it approximately 51 citations. The operator asserts that as it received the proposed assessments for the citations, it

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<sup>1</sup> Commissioner Robert F. Cohen, Jr. assumed office after this case had been filed. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Cohen has elected not to participate in this matter.

timely contested them. It states that the 11 cases involving the citations issued between December and March are currently pending before an administrative law judge. According to Washington Rock, the parties stipulated that all of those proceedings should be stayed pending the special assessment of penalties for citations 6396328 and 6396329 (which Washington Rock claims it intended to contest when they arrived). The proceedings were consolidated and stayed.

Washington Rock further states that during the last week of September 2007, one of its employees, Brittany Perkins, received proposed assessments for several citations, including citations 6396328 and 6396329. The operator asserts that Perkins was not involved in contesting the citations issued between December and March. According to Washington Rock, Perkins showed the proposed assessments to Harry Hart, the president of Washington Rock. Hart told her that Washington Rock was contesting citations 6396328 and 6396329, and not contesting the other three citations. Perkins understood Hart to mean that Washington Rock had already taken the steps necessary to contest citations 6395328 and 6396329. In late November she gave Emily Hart (who was responsible for contesting the citations) a number of documents for filing, including the proposed assessments for citations 6396328 and 6396329. The operator claims that this was the first time that Emily Hart saw that MSHA had proposed special assessments for these citations. She immediately sent a letter to MSHA to contest the assessments and request a hearing. However, Washington Rock received correspondence from MSHA stating that the proposed penalty had become a final order on November 9, 2007. The Secretary states that she does not oppose Washington Rock's request for relief.

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).

Having reviewed Washington Rock's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Washington Rock's failure to timely contest the penalty proposal and whether relief from the final order 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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Michael G. Young, Commissioner

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