

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 24, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2009-1038
	:	A.C. No. 46-08122-170790
v.	:	
	:	Docket No. WEVA 2009-1039
	:	A.C. No. 46-08904-170801
KWV OPERATIONS, LLC	:	
	:	

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”).¹ On March 25, 2009, the Commission received from KWV Operations, LLC (“KWV”) motions by counsel 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).

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

¹ Pursuant to Commission Procedural Rule 12, 29 C.F.R. § 2700.12, on our own motion, we hereby consolidate Docket Nos. WEVA 2009-1038 and WEVA 2009-1039, as both dockets involve similar procedural issues and similar factual backgrounds.

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).

KWV states that its vice president received the assessments and marked the citations that he intended to contest and then forwarded them to KWV’s corporate office. KWV further asserts that through “inadvertence or mistake” the assessments were not timely returned to MSHA. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

Having reviewed KWV's motions and the Secretary's response, we conclude that KWV has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments. KWV's conclusory statement that its corporate office failed to timely file the contests because of "mistake or inadvertence" does not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny the requests for relief without prejudice.² See *Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

² If KWV submits another request to reopen, it should include a full description of facts supporting its claim of "mistake" or "inadvertence," including how the mistake or other problems prevented KWV from responding within the time limits provided in the Mine Act, 30 U.S.C. § 815(a), as part of its request to reopen.

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