

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 18, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2009-1107
v.	:	A.C. No. 46-09029-170281
	:	
MINGO LOGAN COAL COMPANY	:	

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 April 2, 2009, the Commission received a motion by counsel to reopen a penalty assessment issued to Mingo Logan Coal Company (“Mingo Logan”) 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 December 3, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000170281 to Mingo Logan, proposing penalties for 30 citations that had been issued to the operator for alleged violations at its Mountaineer II Mine. According to the affidavit from that mine’s safety manager, on December 11, 2008, he had sent MSHA a contest form indicating Mingo Logan’s desire to contest 16 of the proposed penalties. Attached to the affidavit is a copy of the contest form with certain boxes checked and a handwritten note allegedly indicating when the form was mailed. The affidavit further states that on the same day Mingo Logan sent MSHA a check for the uncontested penalties. Nevertheless, Mingo Logan received a delinquency notice from MSHA dated February 26, 2009, regarding the penalties on the assessment form that Mingo Logan claimed it had contested. Upon receipt of the delinquency notice, Mingo Logan immediately contacted MSHA, and then filed this motion to reopen the penalty assessment.

The Secretary states that she does not oppose the reopening of the assessment, but notes that there is no record of MSHA having received the contest form. She also notes that this is the second time in the last year that the operator has brought a motion to reopen claiming that it mailed the contest form to MSHA but there is no record of MSHA receiving the contest. *Mingo Logan Coal Co.*, 31 FMSHRC 575 (June 2009). The Secretary urges that the operator ensure that in the future it submits the contest form to MSHA’s Civil Penalty Compliance Office in Arlington, Virginia.

Having reviewed Mingo Logan’s motion 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.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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