

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

October 6, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2010-196
v.	:	A.C. No. 46-08315-190383
	:	
MARFORK COAL COMPANY, INC.	:	

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 November 10, 2009, the Commission received from Marfork Coal Company, Inc. (“Marfork”) 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).

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 July 7, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000190383 to Marfork, proposing penalties for 20 violations totaling \$23,788. Marfork contends that it received the proposed assessment on July 14, 2009 and filed its contest form on August 14, 2009, one day late. Marfork claims it did not realize its lateness until it received MSHA's delinquency notice around September 30, 2009.

The Secretary of Labor, who does not oppose Marfork's request, states that shortly after receiving the late filing on August 19, 2009, she notified the operator that its contest was untimely and that the assessment had become a final order. The Secretary also contends that "this case has been paid by checks dated August 20, 2009 and November 5, 2009." Marfork did not respond to the Secretary's statement that the penalties in this case have been paid.

Having reviewed Marfork's motion and the Secretary's response, we find the request to reopen to be moot. The operator has paid the penalties in full. Accordingly, this case is dismissed. *See Riverton Investment Corp.*, 31 FMSHRC 1067 (Oct. 2009); *Performance Coal Co.*, 32 FMSHRC 466 (June 2010).

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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