FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 22, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. CENT 2008-735-M
ADMINISTRATION (MSHA)	:	A.C. No. 41-04518-157473
	:	
v.	:	Docket No. CENT 2008-736-M
	:	A.C. No. 41-04518-140610
PETRA MATERIALS	:	

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 September 5, 2008, the Commission received from Petra Materials ("Petra") a letter 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).

On February 14 and July 17, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment Nos. 000140610 and 000157473, respectively, to Petra for several citations. On September 5, 2008, the Commission received from Petra a letter requesting that the cases be reopened so that the operator could contest and discuss the amounts of the penalties. The operator states that the date to contest the penalties had passed because it "did not know the procedures."

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[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2008-735-M and CENT 2008-736-M, both captioned *Petra Materials* and involving similar procedural issues. 29 C.F.R. § 2700.12.

On September 30, 2008, the Commission received an opposition from the Secretary, in which the Secretary states that the operator made no showing of circumstances that warrant reopening. In addition, as to Docket No. CENT 2008-736-M, the Secretary notes that MSHA notified Petra by letter dated May 14, 2008, that it was delinquent in paying the proposed assessment. She states that Petra fails to explain why it took three months to seek relief once it received the letter advising that it was delinquent in paying the penalties.

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) 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.

Having reviewed Petra's request to reopen and the Secretary's response thereto, we agree with the Secretary that Petra has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments. Petra's conclusory statement that it failed to timely contest because it did "not know the procedures," and its failure to explain the delay in responding to the delinquency notice in Docket No. CENT 2008-736-M do not provide the Commission with an adequate basis to reopen. Accordingly, we deny without prejudice Petra's request. *See, e.g., BRS Inc*., 30 FMSHRC 626, 628 (July 2008); *Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008). The words "without prejudice" mean Petra may submit another request to reopen the case so that it can contest the citations and penalty assessments.[2]

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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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Robert F. Cohen, Jr., Commissioner

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[2] If Petra submits another request to reopen the cases, it must identify the specific citations and assessments it seeks to contest. Petra must also establish good cause for not contesting the citations and proposed assessments within 30 days from the date it received the proposed penalty assessments 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 fault on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation or other misconduct by the adverse party. Petra should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented Petra from responding within the time limits provided in the Mine Act, as part of its request to reopen the case. Petra should also explain its delay in responding to the delinquency notice in Docket No. CENT 2008-736-M. In addition, Petra should submit copies of supporting documents with its request to reopen the case.

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