

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

July 16, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. VA 2008-227
	:	A.C. No. 44-07018-134221-02
v.	:	
	:	
OLD DOMINION ENERGY, INC.	:	

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. (2000) (“Mine Act”). On April 8, 2008, the Commission received from Old Dominion Energy, Inc. (“Old Dominion”) a motion made by counsel 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).

On December 13, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000134221 to Old Dominion, proposing penalties for two violations that previously had been issued to the company. Old Dominion states that “due to a clerical error by the office staff that works for several coal companies,” the proposed penalty assessment form was not sent to MSHA’s Civil Penalty Compliance Office to contest the penalty for Citation No. 6628958, which it now seeks to reopen. Old Dominion further states that it contested the assessment for Order No. 6628988 on the same form. It asserts that it became aware that the penalty for the citation was not contested when it received a Notice of Delinquency dated March 6, 2008, from the U.S. Department of Labor. The Secretary states that she does not oppose Old Dominion’s request to reopen, but

notes that the operator was able to contest the proposed assessment for the other violation on the same form.

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).

While Old Dominion explains that it failed to timely submit a contest of the proposed assessment for the citation because of a clerical error, it does not explain why it contested the other proposed assessment for the order, but not the assessment for the citation on the same form. Nor does it provide any facts to support its claim of clerical error. Consequently, we deny Old Dominion’s request without prejudice. *See Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008).

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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