

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 16, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-375
	:	A.C. No. 05-03836-127865
v.	:	
	:	
TWENTYMILE COAL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners<sup>1</sup>

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 January 31, 2008, the Commission received from Twentymile Coal Company (“Twentymile”) a letter requesting that the Commission 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 October 2, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000127865 to Twentymile, proposing penalties for 18 citations, including Citation No. 7620939. Twentymile states that the mine promptly processed and forwarded the assessment to Twentymile’s corporate office for payment, but that

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<sup>1</sup> Commissioner Robert F. Cohen, Jr., assumed office after this case had been filed. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Cohen has elected not to participate in this matter.

due to a processing error, the penalties that Twentymile was not contesting were not paid until November 2007. Twentymile requests reopening so that it can contest one of the penalties set forth in Proposed Assessment No. 000127865.

The Secretary states that she does not oppose Twentymile's request to reopen and notes for clarity that the only penalty that is unpaid is for Citation No. 7620939. She submits that the operator recently filed a motion in Docket No. WEST 2008-257 that was based on the same grounds for relief as the subject request. The Secretary explains that the operator must take different actions to either pay penalties or to contest proposed penalties, and that a delay in payment should not result in the untimely contest of a proposed penalty.

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 Twentymile's request for relief addresses the mistake that led to the late payment of the uncontested penalties, it does not explain the company's separate failure to return the assessment form to MSHA in order to contest the penalty that it states it intended to contest. Consequently, we deny Twentymile's request without prejudice. *See Twentymile Coal Co.*, 29 FMSHRC \_\_\_\_, slip op. at 2, Docket No. WEST 2008-257 (April 4, 2008) (citing *Marsh Coal Co.*, 28 FMSHRC 473, 475 (July 2006)).<sup>2</sup>

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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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<sup>2</sup> On this date, we similarly deny without prejudice three other requests to reopen where operators have failed to provide meaningful explanations for their failure to timely contest proposed penalty assessments. In the event that Twentymile chooses to refile its request to reopen, it should disclose with specificity its grounds for relief.

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