

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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May 16, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-547-M
	:	A.C. No. 02-03171-121951
v.	:	
	:	
JAMES HAMILTON CONSTRUCTION	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners¹

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 March 4, 2008, the Commission received from James Hamilton Construction (“Hamilton”) a motion by counsel seeking 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 March 27, 2007, Hamilton received Citation No. 6415836 issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). Following receipt of the citation, Hamilton states that it intermingled the citation with other citations and failed to contest it. On November 1, 2007, Hamilton was notified that the civil penalty associated with the citation had

¹ 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.

become delinquent. However, Hamilton notes that the delinquency notice was incorrectly filed with other citations that have since been settled. According to Hamilton, upon review of the file, it discovered that the matter had not been resolved.

The Secretary states that she does not oppose the reopening of the assessments. However, she further notes that Hamilton has filed another request to reopen, Docket No. CENT 2008-347-M, that also involves misplacement of documents. The Secretary concludes that Hamilton should take steps to ensure that it timely contests penalty assessments in the future.

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).

Having reviewed Hamilton's motion to reopen and the Secretary's response thereto, we conclude that Hamilton has failed to provide any specific explanation to justify its failure to timely contest the proposed penalty assessment. Hamilton has attached, as an exhibit to the motion, a notice of delinquency and in its motion provided an explanation of counsel's mishandling of that document. However, in order to lay the predicate for relief from default, Hamilton needs to explain why it failed to respond to the proposed penalty assessment, rather than addressing the delinquency notice. Accordingly, we deny without prejudice Hamilton's request. *See James Hamilton Construction*, 29 FMSHRC 569, 570 (July 2007).²

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

² 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 Hamilton chooses to refile its request to reopen, it should disclose with specificity its grounds for relief.

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