

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 14, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2005-66
v.	:	A.C. No. 46-01271-36418
	:	
EASTERN ASSOCIATED COAL CORP.	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

ORDER

BY: Duffy, Chairman; Suboleski and Young, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On February 4, 2005, the Commission received from Eastern Associated Coal Corp. (“Eastern”) 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 September 2, 2004, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment (A.C. No. 46-01271-36418, incorrectly cited in the body of Eastern’s Motion as A.C. No. 46-01271-39038) to Eastern’s Harris No. 1 Mine in Wharton, West Virginia. In its motion, Eastern states that on November 29, 2004, it discovered that it had inadvertently failed to contest the penalties for four citations in the proposed assessment, and failed to pay the remainder of the assessment. Mot. at 1. Eastern paid all of the penalties in the proposed assessment with the exception of the penalties for the four citations it wished to contest. *Id.* Eastern further asserts that on November 24, 2004, its counsel signed and mailed to the Commission a motion to reopen in these proceedings, but that this

motion appears to have been lost. *Id.* at 2. On January 29, 2005, Eastern’s counsel confirmed that the Commission had not received a motion to reopen. *Id.* The Secretary states that she does not oppose Eastern’s request for relief.

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 Eastern’s motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Eastern’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

I would deny the operator's request for relief from the final order. Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, we have previously afforded a party relief from a final order on the basis of inadvertence or mistake. Slip op. at 2. However, Eastern has failed to provide any explanation to justify its failure to timely contest the proposed penalty assessment. *See Tanglewood Energy, Inc.*, 17 FMSHRC 1105, 1107 (July 1995) (denying request to reopen final Commission order where operator failed to set forth grounds justifying relief). Its motion to reopen the penalty assessment, filed by counsel, states only that Eastern discovered "that it had inadvertently failed to contest four citations." Mot. at 1. Consequently, I respectfully dissent.

Mary Lu Jordan, Commissioner

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