FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 21, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. YORK 2008-166-M
	:	A.C. No. 19-00504-137456
BRS 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 May 1 and 28, 2008, the Commission received from BRS Inc. ("BRS") letters 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 January 29, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment No. 000137456 to BRS for several citations. On May 1, 2008, the Commission received from BRS a letter requesting that this case be reopened so that the operator can set up a payment plan due to "economical hardship." On May 15, the Commission received an opposition from the Secretary, in which the Secretary states that the operator's reason for its request to reopen is not one of the grounds for relief set forth in Rule 60(b) of the Federal Rules of Civil Procedure.

On May 28, 2008, the Commission received a second letter from BRS requesting that the case be reopened so that BRS can contest the citations issued. The operator explains that it believes that some of the citations should not have been issued, and that it had previously alleged

hardship because it believed the civil penalties would be reduced if the operator proved its compliance. On May 30, the Commission received a response from the Secretary, in which the Secretary states that in its second request, BRS again failed to allege reasons sufficient to allow reopening under Rule 60(b). She notes in particular that the operator still has not explained its failure to timely contest the proposed assessment. The Secretary requests that the Commission provide the operator with an opportunity to satisfy the requirements for reopening. She states that once the operator submits a response, the Secretary will indicate whether she believes that reopening is warranted.

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.

Because BRS's request for relief does not explain why the company failed to contest the proposed assessment in a timely manner and is not based on any of the grounds for relief set forth in Rule 60(b), we hereby deny the request for relief without prejudice. *See Marsh Coal Co.*, 28 FMSHRC 473, 475 (July 2006). The words "without prejudice" mean BRS may submit another request to reopen the case so that it can contest the citations and penalty assessments.[1]

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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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[1] If BRS submits another request to reopen the case, it must identify the specific citations and assessments it seeks to contest. BRS 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. BRS should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented BRS from responding within the time limits provided in the Mine Act, as part of its request to reopen the case. BRS should also submit copies of supporting documents with its request to reopen the case.

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