FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 6, 2009

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2009-1
v.	:	A.C. No. 39-01381-152957
	:	
MORRIS, INC.	:	

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

ORDER

BY: Jordan, Young, and Cohen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 1, 2008, the Commission received from Morris, Inc. ("Morris") a request to reopen a penalty assessment that became 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 June 1, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Assessment No. 000152957 to Morris, proposing penalties for two citations that MSHA had issued to Morris on April 30, 2008. According to the Secretary, any contest of those penalties was due on July 17, 2008. However, the Secretary's records show that Morris did not file a contest until July 25, 2008, when it contested one of the two proposed penalties. The request to reopen does not explain the reason for the delay in filing. The Secretary states that she does not oppose the request.

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 mistake, inadvertence, or excusable neglect. *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).

Because Morris's request for relief does not explain the company's failure to contest the proposed assessment on a timely basis, we hereby deny the request for relief without prejudice. *See Eastern Associated Coal, LLC*, 28 FMSHRC 999, 1000 (Dec. 2006). We recognize the concerns expressed in the Chairman's dissenting opinion, and we are sympathetic to a small pro se operator which filed its notice of contest only eight days late. However, in order to justify the reopening of an order which the Mine Act deems final under its strict time limits, the record should provide an explanation, as required by Rule 60(b), for why those time limits were not met.

The words "without prejudice" mean that Morris may submit another request to reopen Assessment No. 000152957 with respect to the penalty it seeks to contest.[1]

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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

[1] Morris must establish good cause for not contesting the citation and proposed penalty within 30 days from the date it received Assessment No. 000152957 from MSHA. Under Rule 60(b), the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Morris should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented Morris from responding within the time limits provided in the Mine Act, as part of its request to reopen. Morris should also submit copies of supporting documents with its request to reopen.

Chairman Duffy, dissenting:

I would reopen this matter, remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700, and, consistent with Rule 28, order the Secretary to file a petition for assessment of penalty within 45 days. *See* 29 C.F.R. § 2700.28.

Morris, Inc. is a very small, seasonal sand and gravel operator filing for relief *pro se* because it was eight days late in contesting the Secretary's proposed penalty of $100.00. The Secretary does not oppose reopening the matter.

MSHA's data profile for Morris, Inc., indicates that the mine has been in operation since September of 1990. The operator's reported compliance history, dating back to 1995, shows that the mine has been cited for 35 violations, 16 of which were issued in 1995, and has had two reportable lost time injuries during that same 14-year period. Total hours of operation per year have ranged between 7,372 hours and 32,944 hours, with the average being 14,921 hours. For 2008, the year the citation in question was issued, the mine operated for 8,644 hours. The number of employees at the mine in 2007-2008 ranged from six to eight, including one office worker.

Morris, Inc. is not a very litigious operator. MSHA's records show that most of the operator's proposed penalties have been paid in full.[2]

Consequently, it is fair to say that this small operator, by its limited experience, would not be intimately familiar with the procedures and deadlines associated with the contesting of proposed assessments of civil penalties before the Commission, the consequences of not contesting them on time, or the roadmap to Commission relief from final orders imposing those assessments.

Given these facts, I do not see what is to be gained, other than strict adherence to form, by forcing Morris, Inc., and the Secretary to expend additional time and trouble over an eight-day delay in contesting a $100.00 penalty in order to obtain the Commission's approval to proceed with this case when there is no dispute between the parties on whether the matter should appropriately proceed in this forum. Except in circumstance where the prerogatives of the

[2] In 1999, however, the operator paid $7,555.00 in lieu of a proposed assessment of $14,055.00 for three violations, and in 2000 it paid $665.00 in lieu of a proposed assessment of $1,215.00 for five violations. MSHA's public information regarding Morris, Inc., does not indicate whether those reduced penalties were arrived at through negotiations with the Secretary alone or whether they arose from a settlement entered into before the Commission. A search of the Commission's archives does not yield any substantive cases involving Morris, Inc., although MSHA's website indicates that two citations issued in January of this year are currently under contest.

Commission are so strong as to demand otherwise, I have generally taken the position that unopposed motions to reopen uncontested assessments that have become final Commission orders should be granted as a matter of course (so long as they are filed within a year of the final orders in question). The circumstances of this case underscore the advisability of that approach. It should be sufficient for the Commission's and the Secretary's purposes to admonish Morris, Inc., that it is incumbent upon mine operators to respond to proposed penalty notices in a timely manner and that unwarranted delays in the future will not be acceptable.

I therefore dissent.

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Michael F. Duffy, Chairman

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