

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 21, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2010-673-M
v.	:	A.C. No. 39-00012-212991
	:	
L.G. EVERIST, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) (“Mine Act”). On May 3, 2010, the Commission received from L.G. Everist, Inc. (“Everist”) a motion 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).

We have held, however, 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).

On March 4, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000212991 to Everist for eight citations and one order that MSHA had issued to the operator in January of this year. Everist states that it intended to contest one of the proposed penalties, but "due to inadvertence and mistake by Company personnel," the proposed assessment form was not processed in a timely manner.

The Secretary opposes the request to reopen on the basis that the operator has made no showing of the exceptional circumstances that warrant reopening. She states that the operator's conclusory statement that the assessment form was not timely processed due to "inadvertence and mistake" is insufficient to justify reopening.

Having reviewed Everist's request and the Secretary's response, we conclude that Everist has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. The operator's explanation that it failed to file a timely contest due to "inadvertence and mistake" by company personnel without any further elaboration, does not provide the Commission with an adequate basis to justify reopening of the assessment. Accordingly, we deny without prejudice Everist's request. *See, e.g., Eastern Associated Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

Any amended or renewed request by Everist to reopen Assessment No. 000212991 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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