

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 25, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2009-1116
v.	:	A.C. No. 15-16231-145671-02
	:	
GRAND EAGLE MINING, INC.	:	

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

ORDER

BY: Duffy, Young, and Nakamura, 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 June 4, 2009, the Commission received from Grand Eagle Mining, Inc. (Grand Eagle”) a motion by counsel to reopen part of 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. *Id.*

However, 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).

Grand Eagle states that, in completing the contest form for Assessment No. 000145671 to contest five of the proposed penalties, it inadvertently indicated that it was contesting the penalty proposed for Citation No. 6695856, when it instead meant to contest the penalty proposed for Citation No. 6695859. The contest form was timely submitted to the Secretary. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.¹

Having reviewed Grand Eagle's request and the Secretary's response, in the interests of justice, we hereby reopen this matter,² and remand it to Administrative Law Judge Jacqueline Bulluck for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.³ Accordingly, consistent with Rule 28, the Secretary shall file a

¹ Though the Secretary did not identify a final order date in her response with respect to the uncontested penalties in the assessment, we note that it is likely that Grand Eagle's motion here was filed more than a year after its receipt of the assessment. Thus, there may be an issue as to whether the motion is time barred under Rule 60. *See* Fed. R. Civ. Pro. 60(c)(1). The Mine Act does not address the fact that penalties may be proposed via assessments that contain multiple proposed penalties, some of which may be contested while others are not. *See* 30 U.S.C. § 815(a). Consequently, in these limited circumstances, where the operator erred by contesting a specific penalty different from the one that it intended to contest, we will treat the request as akin to a motion to amend a pleading, in this case the contest form. The Secretary's non-opposition to Grand Eagle's request indicates that she will not be prejudiced by permitting the limited amendment sought by the operator. Consequently, we will grant the request. *See Cyprus Empire Corp.*, 12 FMSHRC 911, 914-15, 916 (May 1990) (upholding, as consistent with the provisions of Rule 15(a) of the Federal Rules of Civil Procedure regarding the amendment of pleadings, the judge's decision to permit the citation and order at issue to be modified shortly before the hearing).

² Given that all the evidence indicates that the operator met the initial contest deadline, we cannot agree with the dissent that Commission case law regarding operators who fail to meet contest deadlines is relevant in this instance. In any event, an operator's realizing a year or so later that it made a mistake in completing a contest form is likely explained by the time lag between the filing of the contest and the adjudication process. We cannot see what would be gained by denying the motion just to have the operator explain that on the record in this case.

³ Judge Bulluck is currently presiding over related proceedings (Docket No. KENT 2008-882).

petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Patrick K. Nakamura, Commissioner

Chairman Jordan and Commissioner Cohen, dissenting:

The Secretary of Labor issued a proposed penalty assessment to Grand Eagle Mining, Inc. (“Grand Eagle”) on April 3, 2008. The operator mistakenly checked the wrong box on the penalty assessment form and thus contested a penalty different from the one it intended to challenge. The penalty it wished to contest became a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a) (presumably some time in May 2008). However, it was not until June 2009 – over a year later – that Grand Eagle filed a motion to reopen the final order.

As the majority states, the Commission evaluates requests to reopen final section 105(a) orders by referring to Rule 60(b) of the Federal Rules of Civil Procedure, under which a party may be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. Slip op. at 1. Although our colleagues acknowledge that, pursuant to Rule 60(c)(1), the operator’s motion may be time barred, *id.* at 2 n.1, they proceed to grant relief by invoking Rule 15(a) of the Federal Rules of Civil Procedure and treating the operator’s request as a motion to amend a pleading (the contest form).

In so doing, they have, in effect, rewarded the operator for its lengthy delay in filing its request to reopen. In treating this request under the more lenient standards of Rule 15 instead of under Rule 60(b), the majority skipped the required inquiry under Rule 60(b)(1) as to whether the operator was entitled to relief on the basis of mistake, inadvertence, or excusable neglect. Moreover, at this stage in the proceedings, we cannot amend the penalty assessment form by substituting one citation (the one Grand Eagle wished to contest) for another (the citation it actually contested). This is because the latter citation was settled, presumably with the operator receiving the benefit of its mistaken contest.¹ If we were truly amending the penalty assessment form by substituting one citation for another, the operator would be paying the other penalty in full, as though it did not contest it.

We believe the better course would be to deny this motion without prejudice. The operator did not provide any explanation for why it waited a year to request relief. We would ask the operator to confirm the date it received the proposed penalty assessment (30 days from which would be the date it became a final order of the Commission), and thus such confirmation would permit us to calculate whether the motion was filed more than one year later. We would also ask it to submit information as to why it waited until June 2009 to seek relief. *See Con-Agg of Mo, LLC*, 33 FMSHRC ____, slip op. at 3 n.2, No. CENT 2011-193-M (June 1, 2011) (denying without prejudice the operator’s request to reopen and stating that a renewed request to reopen should indicate when the operator first became aware that it had missed the contest deadline and whether it acted promptly in filing its motion to reopen).

¹ We would have thought that as Grand Eagle proceeded to settle the case it had not intended to contest, it would have been put on notice that it had failed to contest the proper citation.

Accordingly, we respectfully dissent.

Mary Lu Jordan, Chairman

Robert F. Cohen, Jr., Commissioner

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