

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

August 19, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2010-316
v.	:	A.C. No. 18-00781-207392
	:	
HERITAGE COAL & NATURAL	:	
RESOURCES, LLC	:	

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 August 2, 2010, the Commission received from Heritage Coal & Natural Resources, LLC (“Heritage”), a request that the Commission 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 December 30, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000207392 to Heritage. On March 31, 2010, MSHA sent Heritage a notice indicating that the penalty had become final and now was delinquent. In its letter, Heritage asserts that it had contested the citations in question "in a timely manner." However, Heritage does not provide any documentation or explanation which demonstrates that it filed a contest of the citation or proposed penalty on time.

The Secretary opposes reopening, stating that there is "no record of MSHA receiving a pre-penalty contest for this citation, or a contest of proposed penalty in this case." She further indicates that because the operator did not respond to the delinquency notice, the assessment was sent to the U.S. Department of Treasury for collection on July 8, 2010. The Secretary asserts that it was only after receiving the Treasury collection notification that Heritage requested reopening.

Having reviewed Heritage's request to reopen and the Secretary's response thereto, we determine that the operator has failed to provide a sufficient basis for the Commission to reopen the penalty assessment. The operator's contention that it had contested in a timely manner lacks sufficient detail and documentation, and is not supported by the record. In addition, Heritage has failed to explain why it delayed approximately four months in responding to the delinquency notice sent by MSHA.¹

Accordingly, we hereby deny without prejudice Heritage's request to reopen. *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that Heritage may submit another request to reopen the Assessment No. 000207392.² Any

¹ In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 10-11 (Jan. 2009).

² If Heritage submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment 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 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. Heritage should include a full description of the facts supporting its claim that it timely contested the citation or of its mistake or other problem that prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. Heritage should also submit copies of supporting documents with its request to reopen. Heritage should further explain and document in similar

amended or renewed request by the operator to reopen this assessment must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.³

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

detail why it delayed in responding to MSHA's delinquency notice.

³ We note that in *Heritage Coal & Natural Res., LLC*, 31 FMSHRC 1009, 1011 (Sept. 2009), the Commission denied without prejudice Heritage's request to reopen in a prior case. We strongly caution Heritage to take all necessary procedures to ensure that it timely contests penalty assessments in the future.

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