

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 13, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2009-1060
v.	:	A.C. No. 15-17741-170925
	:	
KENAMERICAN RESOURCES, INC.	:	

BEFORE: Jordan, Chairman; Duffy, 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. (2006) (“Mine Act”). On May 15, 2009, the Commission received from KenAmerican Resources, Inc. (“KenAmerican”) 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).

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).

KenAmerican states that, according to information obtained from the Civil Penalty Compliance Office of the Department of Labor's Mine Safety and Health Administration ("MSHA"), Proposed Assessment No. 0001790925 was delivered to KenAmerican on December 18, 2008. The operator states that the employee who apparently received the delivery never forwarded the proposed assessment to any of her supervisors and then resigned on February 26, 2009. A mine foreman (and former Manager of Health and Safety) for KenAmerican explains in an affidavit that he became aware of the proposed assessment only after he received a delinquency notice from MSHA on March 12, 2009, and investigated the matter.

The Secretary opposes KenAmerican's request to reopen. She asserts that the operator has made no showing of the exceptional circumstances that warrant reopening but rather an instance of inadequate or unreliable internal distribution procedures, and that the operator has failed to identify facts that, if proven on reopening, would establish a meritorious defense.

Having reviewed KenAmerican's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and 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. This appears to be an isolated instance of an inadvertent error involving an employee who is no longer employed by KenAmerican rather than an indication of inadequate or unreliable internal distribution procedures. Upon discovering the delinquency, KenAmerican investigated the matter, filed its request to reopen within a reasonable time, and provided the Commission with a sufficiently detailed explanation for its failure to timely contest the proposed assessment which was supported by reliable documentation. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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