

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
SUITE 9500  
WASHINGTON, DC 20001

January 28, 2010

SECRETARY OF LABOR,	:	Docket No. KENT 2009-1076
MINE SAFETY AND HEALTH	:	A.C. No. 15-18516-161572
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2009-1077
	:	A.C. No. 15-18516-170126
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	:	Docket No. KENT 2009-1078
	:	A.C. No. 15-18571-173098
	:	
v.	:	Docket No. KENT 2009-1079
	:	A.C. No. 15-18516-175641
	:	
	:	Docket No. KENT 2009-1080
	:	A.C. No. 15-18571-175642
	:	
	:	Docket No. KENT 2009-1081
	:	A.C. No. 15-18516-178191
	:	
	:	Docket No. KENT 2009-1082
	:	A.C. No. 15-18571-178192
	:	
F & G RESOURCES, LLC	:	Docket No. KENT 2009-1083
	:	A.C. No. 15-18516-180784
	:	
	:	Docket No. KENT 2009-1084
	:	A.C. No. 15-18571-180786

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 20, 2009, the Commission received a request to reopen nine penalty assessments issued to F & G Resources, LLC (“F & G”) that may have

become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup>

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).

Docket Nos. KENT 2009-1078; KENT 2009-1080; KENT 2009-1082;  
and KENT 2009-1084

F & G states that it never received Proposed Assessment Nos. 000173098, 000175642, 000178192 and 000180786. The Secretary confirms that the four proposed assessments were returned to the Department of Labor’s Mine Safety and Health Administration (“MSHA”) as undelivered. The Secretary submits that in order to achieve proper service, she will mail the proposed assessments by U.S. Postal Service, Certified Mail, to the address provided in the operator’s reopening request.

Having reviewed F & G’s request and the Secretary’s response, we find F & G’s request to reopen Proposed Assessment Nos. 000173098, 000175642, 000178192 and 000180786 to be moot. The Secretary may proceed as she has outlined in her response, and, if any of the proposed penalties are contested by F & G, this case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. *See Lehigh Cement Co.*, 28 FMSHRC 440, 441 (July 2006).

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2009-1076 through KENT 2009-1084, all captioned *F & G Resources, LLC*, and involving similar factual and procedural issues. 29 C.F.R. § 2700.12.

Docket No. KENT 2009-1081

F & G states that it never received Proposed Assessment No. 000178191 and attaches an MSHA Civil Penalty Collection Report that indicates that the proposed assessment became a final order on April 9, 2009. The Secretary responds that Proposed Assessment No. 000178191 was timely contested and is the subject of Docket Nos. KENT 2009-919 and KENT 2009-920.

Accordingly, having reviewed F & G's request and the Secretary's response, we find F & G's request to reopen Proposed Assessment No. 000178191 to be moot. F & G may pursue its contest of the proposed assessment in Docket Nos. KENT 2009-919 and KENT 2009-920.<sup>2</sup>

Docket Nos. KENT 2009-1076; KENT 2009-1077; KENT 2009-1079;  
and KENT 2009-1083

In its motion to reopen, F & G states that it never received Proposed Assessment Nos. 000161572, 000170126, 000175641, and 000180784. It asserts that its superintendent either did not know or understand the significance of the assessment sheets, and that the sheets were apparently misplaced or lost.

The Secretary opposes reopening these four proposed assessments because she contends that the operator failed to demonstrate the exceptional circumstances that warrant reopening. She asserts that the superintendent's ignorance of the rules and law is not a permissible ground for reopening under Rule 60(b)(1). The Secretary further states that the operator failed to explain why, after it was informed that it had not contested some of the penalty assessments, it took as long as it did to request reopening. The Secretary explains that MSHA's records indicate that the operator requested reopening six months, three months, and one month, respectively, after being notified of the delinquencies regarding Proposed Assessment Nos. 000161572, 000170126, and 000175641.

F & G subsequently filed an amended motion to reopen in which it states that after further investigation, it discovered that Proposed Assessment Nos. 000161572, 000170126, and 000175641 were never delivered to the person and address that were listed on the legal identification form. It explains that the proposed assessments were delivered to and signed for by the General Manager of the operator who owned the Gracie No. 1 Mine before F & G.

In its amended motion, F & G does not explain why it did not contest Proposed Assessment No. 000180784 (Docket No. KENT 2009-1083).

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<sup>2</sup> As indicated on the Civil Penalty Collection Report attached to F & G's amended motion to reopen, 15 of the 25 violations contained in Proposed Assessment No. 000178191 remain unpaid. Our action here does not change the status of the 15 delinquent citations contained in Proposed Assessment No. 000178191.

We note that the record shows that all four of these proposed assessments were delivered to the same address (F & G Resources, LLC; Attn: Robert Gregory Jr. – Owner; 1014 N. 12th St. Ste. 2A; Middlesboro, KY 40965). Likewise, Proposed Assessment No. 000178191, which F & G partially contested, was delivered to this same address. The fact that F & G received and dealt with another proposed assessment during the period when it was failing to contest the four proposed assessments at issue here is relevant to the issue of receipt or non-receipt of these four proposed assessments.

Having reviewed F & G's requests and the Secretary's response, in the interests of justice, we remand Proposed Assessment Nos. 000161572, 000170126, 000175641, and 000180784 to the Chief Administrative Law Judge for a determination of whether F & G's request should be granted in whole or in part.

The present record is insufficient to resolve certain issues. On remand, the Chief Judge should take additional evidence and determine whether F & G received the proposed assessments and delinquency notices, and whether the operator unreasonably delayed in filing its motion to reopen.<sup>3</sup>

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<sup>3</sup> 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, 11 (Jan. 2009). Although the Secretary raised the issue that F & G failed to explain why, after it was informed of the delinquency, it took as long as it did to request reopening, the operator did not file a reply providing an explanation. We encourage parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary's response. *See, e.g., Climax Molybdenum Co.*, 30 FMSHRC 439, 440 n.1 (June 2008).

The Judge shall order further appropriate proceedings based upon those determinations in accordance with the principles described herein, the Mine Act, and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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