FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 27, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 2009-1299-M
ADMINISTRATION (MSHA)	:	A.C. No. 15-18389-132599
	:	
v.	:	Docket No. KENT 2009-1300-M
	:	A.C. No. 15-18389-166970
DIX RIVER STONE	:	
	:	

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 July 6, 2009, the Commission received from Dix River Stone ("DRS") a letter from its president that we construe as a request to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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*

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2009-1299-M and KENT 2009-1300-M, both captioned *Dix River Stone* and involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

In his letter to the Commission, DRS's president states that DRS learned by phone from "an attorney" that it was overdue on paying three citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") in 2007 and 2008, and "[u]pon reviewing our files, we found that we had resubmitted these citations as contested, yet received no response." DRS included with its request marked pages from two assessments that indicated that the penalties in connection with four citations were to be contested.

The Secretary of Labor opposes DRS's request to reopen the two assessments. The record shows that the operator submitted the same statement to MSHA regarding having "resubmitted" the citations, and MSHA responded that it had no record of having ever received contests of the proposed penalties.

A. Assessment No. 000132599

The Secretary further states that because this assessment became a final Commission order on January 3, 2008, DRS's submission of a request to reopen approximately 18 months later should be denied. Under Rule 60(b), any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect, not more than one year after the order was entered. Fed. R. Civ. P. 60(b). Because DRS's request to reopen was filed over a year after the proposed assessment became a final order, its request as to this assessment is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, DRS's request to reopen is denied as to this assessment.

B. Assessment No. 000166970

The Secretary offers evidence that this assessment was received by DRS and opposes reopening it on the ground that the operator offers no explanation for why it failed to contest the assessment in a timely manner. The Secretary also notes that the request to reopen was not filed until five months had passed after MSHA sent DRS a delinquency notice regarding the assessment, and may have been prompted by efforts by the U.S. Treasury Department to collect the outstanding penalties.

Having reviewed DRS's request and the Secretary's response, we conclude that DRS has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments. The statements in DRS' request do not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny the request for relief as to this

assessment without prejudice.[2] *See Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

[2] The words "without prejudice" mean that DRS may submit another request to reopen this assessment so that it can contest specific citations and penalty assessments. If DRS submits another request to reopen, it must establish good cause for not contesting the citations and proposed assessments within 30 days from the date it received the proposed penalty 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 fault on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. DRS should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented DRS from responding within the time limits provided in the Mine Act, as part of its request to reopen. DRS should also submit copies of supporting documents with its request to reopen.

In any such request DRS must also address why it did not file its request to reopen until months after the MSHA notice should have alerted it to its delinquency. In the context of penalty assessments, in considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice or other notification from MSHA and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009). Since the time DRS filed its request, the Commission has held that any request to reopen filed more than 30 days after the receipt of such a notice is grounds for denial of that request. *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009).

Any amended or renewed request by DRS to reopen Assessment No. 000166970 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

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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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