

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 12, 2010

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

ROGERS GROUP, INC.

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Docket No. KENT 2009-1552-M
A.C. No. 15-00013-190469

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 September 1, 2009, the Commission received from Rogers Group, Inc. (“Rogers”) a request 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).

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 July 8, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000190469 to Rogers, proposing penalties for eight citations and an order that had been issued to Rogers in May 2009. Rogers states that it did not realize that the citations from the same inspections "came in two dockets." The Secretary states that she does not oppose Roger's request to reopen the assessment.

Having reviewed Rogers' request to reopen and the Secretary's response, we conclude that the operator has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. The operator's statement that it failed to timely contest the proposed penalties because it did not realize that citations from the same inspection "came in two dockets" does not provide the Commission with an adequate basis to reopen without further elaboration. Accordingly, we hereby deny the request for relief without prejudice. *See Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007). The words "without prejudice" mean that Rogers may submit another request to reopen Assessment No. 000190469 so that it can contest the proposed penalties.¹

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

¹ If Rogers submits another request to reopen, it must establish good cause for not contesting the citations and proposed penalties within 30 days from the date it received the proposed 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. Rogers should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented Rogers from responding within the time limits provided in the Mine Act, as part of its request to reopen. Rogers should also submit copies of supporting documents with its request to reopen.

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