FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 20, 2009

SECRETARY OF LABOR,	:	Docket No. KENT 2009-573
MINE SAFETY AND HEALTH	:	A.C. No. 15-18987-147298
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2009-574
v.	:	A.C. No. 15-18987-154004
	:	
C.S.A. MINING INCORPORATED	:	Docket No. KENT 2009-575
	:	A.C. No. 15-18987-160184
	:	
	:	Docket No. KENT 2009-576
	:	A.C. No. 15-18987-162936

BEFORE: Duffy, Chairman; Jordan, 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 January 2, 2009, the Commission received a request to reopen four penalty assessments issued to C.S.A. Mining Incorporated ("CSA") 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).

On April 16, 2008, June 18, 2008, August 13, 2008, and September 17, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment Nos. 000147298, 000154004, 000160184, and 000162936, respectively, to CSA,

---

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2009-573, KENT 2009-574, KENT 2009-575 and KENT 2009-576, all captioned *C.S.A. Mining Incorporated*, and involving the same factual and procedural issues. 29 C.F.R. § 2700.12.

alleging multiple violations and proposing civil penalties in the sum of $163,381. The president of CSA contends that the issuance of the citations and orders caused him financial and personal stress and that, consequently, CSA was unable to timely contest the proposed penalties.

The Secretary opposes reopening on the ground that CSA's explanation for failing to timely file notices of contests in the four cases does not constitute the "exceptional circumstances" necessary to support reopening. The Secretary further states that reopening is unjustified here because CSA failed to identify facts which, if proven, would establish a meritorious defense. In addition, the Secretary contends that the operator fails to explain why, after it was informed that it had not contested the penalty assessments, it took as long as it did to request reopening. The Secretary explains that although MSHA sent CSA delinquency notices on July 10, 2008, September 11, 2008, November 6, 2008, and December 10, 2008, that Proposed Assessment Nos. 000147298, 000154004, 000160184, and 000162936, respectively, had become delinquent, the operator did not request reopening until January 2, 2009 – between one and six months after MSHA sent the letters.

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).

Having reviewed CSA's request to reopen and the Secretary's response thereto, we agree that CSA has failed to provide an adequate basis for the Commission to reopen the four penalty assessments. CSA's request for relief does not explain the company's failure to contest the proposed assessment on a timely basis, and is not based on any of the grounds for relief set forth in Rule 60(b). Furthermore, CSA has failed to explain the delay in responding to the delinquency notices. Accordingly, we hereby deny without prejudice CSA's request. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that CSA may submit another request to reopen the assessments so that it can contest the citations and penalty assessments.[2]

____
Michael F. Duffy, Chairman

____
Mary Lu Jordan, Commissioner

____
Michael G. Young, Commissioner

____
Robert F. Cohen, Jr., Commissioner

---

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

Distribution:

Alga Jent, President
CSA Mining, Inc.
P.O. Box 126
Kite, KY 41828

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021