

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 22, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2009-624
v.	:	A.C. No. 15-19116-157695 N137
	:	
WKJ CONTRACTOR’S INC.	:	

BEFORE: Duffy, Chairman; Jordan, and Young, Commissioners¹

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 8, 2009, the Commission received from WKJ Contractor’s Inc. (“WKJ”) a motion by counsel seeking 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).

On July 22, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000157695 to WKJ, proposing a civil penalty for Citation No. 7505222. In its request, WKJ states that a copy of an attached “notice of appeal” was mailed to MSHA’s office in Barbourville, Kentucky, on September 2, 2008. The attached document states that it serves to appeal the citation. The Secretary states that she does not oppose reopening the proposed penalty assessment.

¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), the Commission has delegated the power to rule on this reopening request to a three-member panel.

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).

Although it appears that the operator may have attempted to contest Citation No. 7505222 by mailing its notice of contest to MSHA’s office in Barbourville, Kentucky (*see* 29 C.F.R § 2700.20(b)),² the operator fails to provide an explanation for why it failed to timely contest the proposed penalty assessment by returning the completed assessment form to MSHA’s Civil Penalty Compliance Office in Arlington, Virginia, as instructed by the assessment form (*see also* 29 C.F.R. § 2700.26).

² We note that the Commission’s Docket Office was not informed that MSHA had received WKJ’s notice of contest of the citation. As a result, no contest proceeding has been docketed.

Because WKJ's request for relief does not explain the company's failure to contest the proposed assessment on a timely basis, we hereby deny the request for relief without prejudice. *See FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007).³

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

³ If WKJ submits another request to reopen, it must establish good cause for not contesting the proposed penalty assessment within 30 days from the date it received it 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. WKJ should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented WKJ from responding within the time limits provided in the Mine Act (30 U.S.C. § 815(a)), as part of its request to reopen. WKJ should also submit copies of supporting documents with its request to reopen.

Distribution

James W. Craft, II, Esq.
21 North Webb Avenue
Whitesburg, KY 41858

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