

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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June 15, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2009-705
v.	:	A.C. No. 15-07082-128255
	:	
FREEDOM ENERGY MINING	:	
COMPANY	:	

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 February 12, 2009, the Commission received from Freedom Energy Mining Company (“Freedom Energy”) a motion from counsel 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).

The proposed penalty assessment at issue, No. 000128255, was issued to Freedom Energy by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) on October 4, 2007. Freedom Energy states that it intended to file a contest as demonstrated by the cover letter which its counsel drafted at that time¹ but that through inadvertence of counsel, the contest was not filed with MSHA.

¹ Freedom Energy purports to have attached a copy of the cover letter to its motion to reopen as an exhibit. However, the exhibit was not attached to the copy of the motion which the Commission received.

In response, the Secretary states that the assessment at issue cannot be reopened because it became a final order of the Commission on November 14, 2007, which is more than one year before Freedom Energy filed its reopening request.

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 inadvertence or mistake. *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).

We have been presented with Freedom Energy’s failure to timely contest the proposed penalty assessment. 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 Freedom Energy did not seek relief from the final order until more than one year had passed, its request is untimely. *JS Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, Freedom Energy’s request is denied.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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