

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001

June 1, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2009-740
v.	:	A.C. No. 15-18826-171552
	:	
HOPKINS COUNTY COAL, LLC	:	

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 February 23, 2009, the Commission received a motion by counsel to reopen a penalty assessment issued to Hopkins County Coal, LLC (“HCC”) 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 December 16, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000171552 to HCC, proposing penalties for 80 citations that had been issued to the operator for alleged violations at its Elk Creek mine. According to affidavits from the mine’s general manager and safety director included with the motion, the assessment was received on December 29, 2008, and marked with the intent to contest 38 of the proposed penalties. However, an ice storm led to a week-long

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.

power outage at the mine in late January and early February 2009 that prevented the timely submission of the contest form.

The Secretary states that she does not oppose the reopening of the assessment, but notes and provides documentation that the proposed assessment form was received by HCC on December 22, 2008, and thus was already late by the time the ice storm hit on January 27, 2009.

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 HCC’s motion and the Secretary’s response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for HCC’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. On remand, the Chief Judge should obtain from HCC an explanation for the discrepancy between the December 22, 2008, date the Secretary says the assessment was received by HCC, and the December 29, 2008, date HCC states in its motion that it received the assessment. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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