

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 17, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 2009-9
	:	A.C. No. 15-18267-157148
	:	
v.	:	
	:	
MANALAPAN 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 May 13, 2009, the Commission received from Manalapan Mining Company (“Manalapan”) a letter 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). The Commission had denied without prejudice a previous request by Manalapan regarding the same assessment. *See Manalapan Mining Co.*, 31 FMSHRC 392 (Apr. 2009).

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 16, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued proposed penalty Assessment No. 000157148 to Manalapan. In its original request to reopen, Manalapan asserted that it would be a great hardship for it to pay the total balance of outstanding penalty assessments shown on that assessment. The Commission denied the request to reopen because Manalapan had failed to explain why it had not contested Assessment No. 000157148 on a timely basis, and because its request was not based on any of the grounds for relief set forth in Rule 60(b). 31 FMSHRC at 394.

Manalapan's second request to reopen states that the original request was submitted by a former secretary for the company who had lost the assessment, and had prepared and filed the original request without the operator knowing she had lost the assessment. Manalapan asserts that it did not know about the assessment until it received the Commission's order denying the request on or about April 21, 2009.

In response, the Secretary points out that the original request to reopen includes, in addition to the signature of Manalapan's secretary, the signature of its safety director, and that his signature appears to match the signature of that official on the operator's second request to reopen. The Secretary also argues that the safety director was served with the Commission's docketing statement for the original request, dated October 9, 2008.

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).

While Manalapan's second request to reopen includes an explanation for its failure to timely file a contest in response to the assessment – the contest form had been lost by the secretary – the second request otherwise fails to comply with the plain instructions the Commission included in its order regarding any renewed or amended request to reopen the assessment here. *See* 31 FMSHRC at 394 n.8. Moreover, the Secretary's response raises important credibility issues regarding Manalapan's filings in this proceeding. Accordingly, we again deny Manalapan's request to reopen, but this time with prejudice.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution:

Jim Brummett, Safety Dir.
Manalapan Mining Company, Inc.
8174 East Hwy. 72
Pathfork, KY 40863

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