

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 8, 2009

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

CLEAN ENERGY MINING COMPANY

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Docket No. KENT 2009-925
A.C. No. 15-10753-170921

BEFORE: Jordan, Chairman; Duffy, 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 April 16, 2009, the Commission received from Clean Energy Mining Company (“Clean Energy”) 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).

We have held, however, 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).

On December 10, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000170921. However, both the operator and the Secretary now agree that the proposed assessment was not received by Clean Energy and was returned to MSHA undelivered. The Secretary states that she “will mail the proposed assessment to . . . the operator” again and that “Clean Energy will then have 30 days after receipt of the proposed assessment to either pay or contest the penalty.”

Having reviewed Clean Energy’s request and the Secretary’s response, we find the request to reopen to be moot because Clean Energy never properly received the proposed assessment and therefore it did not become a final order of the Commission. As stated above, once the Secretary mails the proposed assessment, Clean Energy will have 30 days from the date of its receipt to either contest or pay the proposed penalty. If the proposed penalty is timely contested by Clean Energy, this case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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