

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December 15, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2010-1080
v.	:	A.C. No. 15-19008-212909
	:	
B & W RESOURCES, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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 18, 2010, the Commission received from B & W Resources, Inc. (“B & W”) 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).

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 March 4, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000212909 to B & W proposing a penalty for one order that had been issued to the operator on January 6, 2010. According to B & W, it had moved its office and hired new personnel to manage the office. The operator explains that the recipient's inexperience in promptly delivering mail to the appropriate person, and a change in Safety Director personnel, contributed to the responsible person not receiving the assessment form until April 15, 2010. The operator states that when the appropriate person received the assessment form, the contest was promptly faxed to MSHA. The operator submits that it has since corrected the personnel problem.

The Secretary opposes the request to reopen. She states that B & W's explanation for the failure to file a timely contest is conclusory and thus insufficient to establish grounds for reopening the assessment. The Secretary notes that the fact of inadequate or unreliable office procedures does not constitute an adequate excuse under Rule 60(b) of the Federal Rules of Civil Procedure. The Secretary also points out that B & W is currently delinquent at this mine with eight separate penalty assessments totaling \$95,984.07, including this case, and has three other mines sites that have an outstanding delinquency totaling \$4,785.39, which she alleges is an indication that the operator has acted in bad faith in seeking to reopen this final order.

Having reviewed B & W's request and the Secretary's response, we conclude that the operator has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Without further elaboration on all of the relevant circumstances, including the allegations of delinquent penalties raised by the Secretary, the operator's explanation has not provided the Commission with an adequate basis to reopen. Accordingly, we hereby deny the request for relief without prejudice. *See Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007). The words "without prejudice" mean that B & W may submit another request to reopen Assessment No. 000212909.¹

¹ If B & W submits another request to reopen these cases, it must establish good cause for not contesting the citations and proposed assessments within 30 days from the date it received the proposed penalty assessments 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. B & W should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen these cases. B & W should also include copies of all documents supporting its request to reopen these cases.

At a minimum, the operator must provide an affidavit satisfactorily responding to the allegations raised in the Secretary's response, an explanation of how it normally contests proposed penalties, and specific information regarding why that process did not work in this instance. Any amended or renewed request by B & W to reopen Assessment No. 000212909 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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