

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December, 14, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2010-197
v.	:	A.C. No. 15-18335-193080
	:	
DODGE HILL MINING COMPANY, LLC	:	

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 August 9, 2010, the Commission received from Dodge Hill Mining Company, LLC (“Dodge Hill”) a renewed motion by 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).

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 August 4, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000193080 to Dodge Hill for 16 citations MSHA had issued to the operator in June of that year. However, the operator did not file a timely notice of contest. In its first motion to reopen, filed on November 10, 2009, Dodge Hill stated that it intended to contest six of the proposed penalties, but because of a "clerical error" it failed to return the contest form to MSHA. The Commission subsequently denied the request to reopen without prejudice because of Dodge Hill's failure to provide a sufficiently detailed explanation for its failure to file a timely contest. *See Dodge Hill Mining Co.*, 32 FMSHRC 754 (July 2010).

The renewed request to reopen from Dodge Hill includes an affidavit from the Assessment Analyst for its corporate parent, who explains that the assessment was not processed as it normally would have been because she inadvertently misplaced it after the operator had decided which penalties it wished to contest. Dodge Hill also demonstrates that it had requested conferences on the underlying citations. The Secretary of Labor did not oppose Dodge Hill's original motion and has not responded to its renewed motion.

Having reviewed Dodge Hill's requests and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

Distribution:

Michael T. Cimino, Esq.  
Jackson Kelly, PLC  
1600 Laidley Tower  
P.O. Box 553  
Charleston, WV 25322

K. Brad Oakey, Esq.  
Jackson Kelly, PLLC  
175 Main St., Suite 500  
P.O. Box 2150  
Lexington, KY 40588-9956

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., 25<sup>th</sup> 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