

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001

January 25, 2010

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

v.

WKJ CONTRACTOR’S INC.

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Docket No. KENT 2010-73
A.C. No. 15-19116-157695

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 January 8, 2009, and October 15, 2009, the Commission received from WKJ Contractor’s Inc. (“WKJ”) motions 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. Under Rule 60(b), any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect, not more than one year after the order was entered. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). 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 May 22, 2009, in Docket No. KENT 2009-624, the Commission denied without prejudice WKJ's first request to reopen on the basis that the operator failed to provide an explanation for why it failed to timely contest the proposed penalty assessment by returning the completed assessment form to the Civil Penalty Compliance Office of the Department of Labor's Mine Safety and Health Administration ("MSHA") in Arlington, Virginia, as instructed by the assessment form. *WKJ Contractor's Inc.*, 31 FMSHRC 551, 552 (May 2009). Instead, the operator explained that it attempted to contest the underlying citation by mailing a notice of contest to MSHA's office in Barbourville, Kentucky, rather than to the Commission.¹ The Commission instructed the operator that if it submitted another request to reopen, it must establish good cause for not contesting the proposed penalty assessment within 30 days from the date the proposed assessment was received from MSHA. *Id.* We stated in part that WKJ should include "a full description of the facts supporting its claim of 'good cause,' including how the mistake or other problem prevented WKJ from responding within the time limits," and that it should also submit copies of supporting documents with its request to reopen. *Id.* at 553 n.3.

On October 9, 2009, WKJ filed a second motion to reopen. In the motion, counsel for WKJ states that after it filed its contest of the underlying citation with MSHA's office in Kentucky, it was informed by MSHA that "all correspondence should have been sent to the Washington, DC, address," and that, since that time, all correspondence has been sent to that address.

On November 13, the Secretary filed an opposition to WKJ's request to reopen. She states that the operator filed its second request more than one year after the penalty assessment became a final order on August 28, 2009, and that the request is untimely under Rule 60(b). The Secretary also notes in part that the operator makes no showing of the exceptional circumstances

¹ The Mine Act sets forth a scheme of dual filing relating to contests of citations and orders (29 C.F.R. Part 2700, Subpart B), and contests of proposed penalties (29 C.F.R. Part 2700, Subpart C). *The filing of a contest of a citation does not constitute a challenge to a proposed penalty for that citation.* See 29 C.F.R. § 2700.21(a) ("The filing of a notice of contest of a citation or order issued under section 104 of the Act . . . does not constitute a challenge to a proposed penalty assessment that may subsequently be issued by the Secretary under section 105(a) of the Act . . . which is based on that citation or order."); 29 C.F.R. § 2700.26 ("A person who wishes to contest a proposed penalty assessment must provide such notification regardless of whether the person has previously contested the underlying citation . . ."). The operator explained that it had mailed its contest of a citation to a regional MSHA office, rather than to the Commission, which is an independent agency that is separate from MSHA. However, the operator offered no explanation for why it failed to send the proposed penalty assessment form to MSHA in its Arlington, Virginia, office.

that warrant reopening because the operator failed to explain why it failed to return the completed assessment form to MSHA's Civil Penalty Compliance Office in Arlington, Virginia.

We conclude that WKJ's request for relief was not made within a reasonable time and fails to provide an adequate basis for reopening. WKJ waited almost five months before filing its second motion to reopen and has not offered any reason for that delay. WKJ, as the movant, carries the burden of establishing its entitlement to relief. Delay in seeking that relief, if unexplained, has been a relevant consideration in denial of motions to reopen. *Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009). Moreover, the operator again fails to offer any explanation for its failure to timely contest the proposed penalty assessment and merely reiterates the circumstances regarding the misfiling of its separate contest of the underlying citation. The operator has failed to provide the Commission with any basis to warrant reopening. Accordingly, we deny WKJ's request for relief.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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