

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

February 7, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2010-748
v.	:	A.C. No. 15-19301-200653
	:	
NALLY & HAMILTON ENTERPRISES, 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 March 4, 2010, the Commission received from Nally & Hamilton Enterprises, Inc. (“N&H”) 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 October 15, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000200653 to N&H for eight citations it had issued to N&H in September 2009. N&H states that it was not aware of the proposed assessment until it was notified of the delinquency by MSHA. It contends that the clerical staff did not forward the documents to the correct employees and that the employee who normally receives the assessments was ill at the time the assessment was received in its office in Calvin, Kentucky. The operator asserts that it is in the process of ensuring that assessments are sent to its office in Bardstown, Kentucky, for processing.

The Secretary opposes and states that the operator's conclusory statements are insufficient to justify reopening. She states that the record indicates that the assessment was delivered via FedEx to, and signed for by, the operator on October 22, 2009, and that a delinquency notice was sent to the operator on January 7, 2010. She argues that the operator's internal office procedures were inadequate in that it did not assign another employee to perform the duties of the absent employee responsible for processing assessments during the time of his absence, and thus do not constitute grounds for reopening.

Having reviewed N&H's request and the Secretary's response, we conclude that N&H has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. The operator's explanation that it failed to file a timely contest because its clerical staff failed to forward the documents to the correct employees and because the responsible employee who normally handles assessments was absent (Mot. at 1), without any further elaboration, does not provide us with an adequate basis to justify reopening the assessment. Additionally, the operator does not explain why it waited nearly two months after receiving the delinquency notice to request reopening. Accordingly, we deny without prejudice N&H's request. *See, e.g., Eastern Associated Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

Any amended or renewed request by N&H to reopen Assessment No. 000200653 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

Distribution:

C. Bishop Johnson, Esq.
Cawood & Johnson, PLLC
108 Kentucky Ave.
P.O. Drawer 128
Pineville, KY 40977

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
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