FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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February 22, 2011

SECRETARY OF LABOR,	:	Docket No. KENT 2010-790
MINE SAFETY AND HEALTH	:	A.C. No. 15-18687-203607
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2010-791
v.	:	A.C. No. 15-18854-203608
	:	
LIGGETT MINING, LLC	:	Docket No. KENT 2010-792
	:	A.C. No. 15-19080-203613

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act").[1] On March 10, 2010, the Commission received from Liggett Mining, LLC ("Liggett") motions seeking to reopen three penalty assessments 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

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2010-790, KENT 2010-791, and KENT 2010-792, all captioned *Liggett Mining, LLC*, and all involving the same procedural issues. 29 C.F.R. § 2700.12.

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 November 19, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment Nos. 000203607, 000203608, and 000203613 to Liggett for 54 citations that MSHA had issued to the operator. Liggett, represented by George R. Bowman,[2] states that upon receipt, the company's human resources manager forwarded the assessments via email to the company's representative to have contests filed for each, but "could not confirm with any certainty that the email transmittal was received." Mot. at 2. Liggett asserts that its representative did not have any record of receiving the emails. *Id*. On April 6, 2010, the Commission received responses from the Secretary of Labor stating that she does not oppose the request to reopen the assessments.

Having reviewed Liggett's requests and the Secretary's responses, we conclude that Liggett has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments. The operator's explanation that it could not confirm the emails it sent to its representative were received, without any further elaboration, does not provide us with an adequate basis to justify reopening the assessment. We note in particular that Liggett failed to provide any documentation of those emails or explain its failure to do so. Nor did Liggett explain what, if anything, was done to confirm that the emails, which related to a total of $67,544 in penalties, were received by the representative. Accordingly, we deny without prejudice Liggett's request. *See, e.g., Eastern Assoc. Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

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[2] The request to reopen was sent by George R. Bowman, who states that he represents Liggett. Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall into one of the categories in Rule 3(b), which include parties, representatives of miners, an "owner, partner, officer or employee" of certain parties, or "[a]ny other person with the permission of the presiding judge or the Commission." 29 C.F.R. § 2700.3(b). It is unclear whether Mr. Bowman satisfied the requirements of Rule 3 when he filed the operator's request. We have determined that, despite this, we will consider the merits of the operator's request in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, Mr. Bowman must demonstrate to the Commission or presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seek permission to practice before the Commission or judge pursuant to Rule 3(b)(4).

Any amended or renewed request by Liggett to reopen Assessment Nos. 000203607, 000203608, and 000203613 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

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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

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