

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

January 6, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. KENT 2010-978
	:	A.C. No. 15-18775-208623
MCCOY ELKHORN COAL	:	
CORPORATION	:	

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 April 26, 2010, the Commission received from McCoy Elkhorn Coal Corporation (“McCoy”) 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 December 2, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 7446687 to McCoy. McCoy filed a notice of contest for that citation. See Docket No. KENT 2010-343-R. On January 13, 2010, MSHA issued Proposed Assessment No. 000208623, which assessed penalties for 17 violations, including Citation No. 7446687. In an affidavit, the safety director for McCoy states that he inadvertently paid the penalty for Citation No. 7446687 when he paid the other penalties contained on the assessment. McCoy asserts that it learned of its mistake on March 29, 2010, in conjunction with the underlying contest matter. McCoy filed its motion to reopen within a month of discovering its mistake.

The Secretary opposes reopening the proposed penalty assessment, maintaining that the motion fails to sufficiently explain the inadvertence so as to warrant the reopening. She also faults the operator for failing to present facts that would constitute a meritorious defense if the case were to be reopened.

The Commission determines that McCoy has established that its payment of the penalty assessment associated with Citation No. 7446687, resulted from inadvertence or mistake. We find that its prior filing of a notice of contest demonstrates an intention to contest. *Phelps Dodge Sierrita, Inc.*, 24 FMSHRC 661, 662 (July 2002) (reopening when an operator contested the citation and then inadvertently paid the associated penalty). Moreover, McCoy acted very promptly in submitting its request to reopen the assessment, within 30 days of discovery of its mistaken payment. *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009).

Having reviewed McCoy's request 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.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

Distribution:

Melanie J. Kilpatrick, Esq.
Rajkovich, Williams, Kilpatrick & True, PLLC
3151 Beaumont Centre Circle, Suite 375
Lexington, KY 40513

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