

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 17, 2011

SECRETARY OF LABOR :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) : Docket No. KENT 2011- 171  
 : A.C. No. 15-19297-215828  
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 v. : Docket No. KENT 2011- 172  
 : A.C. No. 15-02057-215805  
SAPPHIRE COAL COMPANY :

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”). On November 3, 2010, the Commission received motions by counsel to reopen penalty assessments issued to Sapphire Coal Company (“Sapphire”) that became final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup>

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

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2011-171 and KENT 2011-172, both captioned *Sapphire Coal Company*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

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 April 6, 2010, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment Nos. 000215828 and 000215805 to Sapphire. On June 30, 2010, MSHA issued delinquency letters in both cases. Sapphire asserts that it timely faxed contest forms to MSHA’s Civil Penalty Compliance Office on April 14, 2010 – six business days after issuance of the proposed assessment. As support, Sapphire submits, in part, copies of the documents allegedly filed, including the proposed assessment forms, and a facsimile confirmation page.<sup>2</sup> Sapphire paid the remaining uncontested citations on May 10, 2010.

Although the Secretary states that MSHA has no record of receiving penalty contest forms for the referenced cases, she does not dispute Sapphire’s assertions. The Secretary nevertheless opposes Sapphire’s request to reopen on the grounds that Sapphire has failed to explain why it waited four months after MSHA issued the delinquency letters to file its motions to reopen.

Having reviewed Sapphire’s request to reopen and the Secretary’s response thereto, we conclude that Sapphire has failed to explain why it delayed approximately four months in responding to the delinquency notice sent by MSHA.<sup>3</sup> Therefore, the operator has failed to provide an adequate basis for the Commission to reopen the penalty assessments. Accordingly, we hereby deny without prejudice Sapphire’s requests to reopen. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words “without prejudice” mean that Sapphire may submit another request to reopen Assessment Nos.

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<sup>2</sup> Although the facsimile confirmation page demonstrates that something was faxed to MSHA’s Civil Penalty Compliance Office, the confirmation fails to indicate what was being faxed or the specific case numbers involved.

<sup>3</sup> In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator’s receipt of a delinquency notice and the operator’s filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion).

000215828 and 000215805.<sup>4</sup> Any amended or renewed request by the operator to reopen this assessment must be filed within 30 days 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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<sup>4</sup> We encourage parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary's response. *See, e.g., Climax Molybdenum Co.*, 30 FMSHRC 439, 440 n.1 (June 2008). Accordingly, where the Secretary raises the issue of the delay between receipt of a delinquency letter and filing of the request to reopen, an operator who does not explain why it took as long as it did to request reopening, after it was informed of a delinquency, does so at its peril. Sapphire should also submit copies of supporting documents with its request to reopen.

Distribution:

Robert H. Beatty, Jr., Esq.  
Dinsmore & Shohl, LLP  
215 Don Knotts Blvd., Suite 310  
Morgantown, WV 26501

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., 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