

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

September 24, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2009-447-M
v.	:	A.C. No. 47-02918-175141 W178
	:	
AUGUST WINTER & SONS, INC.	:	

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 May 1, 2009, the Commission received from August Winter & Sons, Inc. (“Winter”) a letter 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 January 21, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment No. 000175141 to Winter, proposing a civil penalty for one citation. The operator's safety director states that he was not notified of the citation until April 24, 2009, "[d]ue to clerical issues" and, as a result of the delay, the operator was unable to timely contest the citation and proposed penalty. The Secretary opposes the request to reopen on the ground that the operator's statement that it failed to timely contest the proposed assessment due to "clerical issues" does not demonstrate circumstances that warrant reopening.

Having reviewed Winter's request to reopen and the Secretary's response, we agree with the Secretary that Winter has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Winter's conclusory statement that it failed to timely contest because of clerical issues does not provide the Commission with an adequate basis to reopen. Accordingly, we deny without prejudice Winter's request. *See, e.g., BRS Inc.*, 30 FMSHRC 626, 628 (July 2008); *Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008). The words "without prejudice" mean Winter may submit another request to reopen the case so that it can contest the citation and penalty assessment.¹

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

¹ If Winter submits another request to reopen the case, it must establish good cause for not contesting the citation and proposed assessment within 30 days from the date it received the proposed penalty assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Winter should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented Winter from responding within the time limits provided in the Mine Act, as part of its request to reopen the case. Winter should submit copies of supporting documents with its request to reopen the case.

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