

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 31, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2010-714
v.	:	A.C. No. 11-03141-0201809
	:	
MACH MINING, LLC	:	

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 May 7, 2010, the Commission received from Mach Mining, LLC (“Mach Mining”) a motion by counsel 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 September 29, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citations Nos. 6680550 and 6680551 to Mach Mining, alleging violations of a ventilation plan. The citations were issued because MSHA alleged deficiencies in the operator's plan, and the parties had reached an impasse. Mach timely contested the citations, and the matter proceeded to hearing before Administrative Law Judge Margaret Miller on November 3 through November 5, 2009, in Docket Nos. LAKE 2010-1-R and LAKE 2010-2-R. The Judge issued her decision in the contest proceeding on January 28, 2010, upholding the citations. 32 FMSHRC 149, 168 (Jan. 2010). Mach Mining then filed a Petition for Discretionary Review, which was granted by the Commission on March 5, 2010.

Meanwhile, on November 4, 2009, MSHA issued Proposed Assessment No. 000201809 to Mach Mining, proposing civil penalties for violations associated with 16 unrelated citations, including Citations Nos. 6680550 and 6680551. On November 30, 2009, Mach Mining paid the penalties for ten of the citations, including Citations Nos. 6680550 and 6680551. Mach Mining states that it inadvertently overlooked the fact that these two citations were the subject of the ventilation plan dispute before Judge Miller, and that payment had been authorized by mistake. The operator's mine manager explains in an affidavit that he was preoccupied during the month of November with the hearing and resolving the ventilation plan impasse with MSHA. Mach Mining states that its counsel first became aware that the penalties had been paid on April 30, 2010, when counsel for MSHA informed the operator's counsel. The operator then promptly filed the subject motion to reopen.

The Secretary opposes Mach Mining's request to reopen. She explains that the operator has not shown the extraordinary circumstances that warrant reopening. The Secretary states in part that, given the hearing, Mach Mining should have been acutely aware of any developments related to the case.¹

¹ We note that the Secretary did not inform Judge Miller of the status of developments in the case, such as informing her during the hearing that the penalties for Citation Nos. 6680550 and 6680551 had been proposed, or that the operator had paid the penalties after the hearing but before the Judge issued her decision.

Having reviewed Mach Mining's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to Judge Miller 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.² 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

² The Judge's January 28, 2010, decision remains in effect as of the date of its issuance.

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