

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 25, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. PENN 2006-75-M
ADMINISTRATION (MSHA)	:	A.C. No. 36-07156-47898
	:	
v.	:	Docket No. PENN 2006-76-M
	:	A.C. No. 36-07156-67440 A
	:	
WILLIAMS & SONS	:	Docket No. PENN 2006-77-M
SLATE & TILE, INC.	:	A.C. No. 36-07156-70601
	:	
	:	Docket No. PENN 2006-78-M
	:	A.C. No. 36-07156-45867

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 September 15, 2009, the Commission received a motion from the Secretary of Labor seeking to reopen dismissal orders issued by Chief Administrative Law Judge Robert Lesnick in these proceedings. The orders involve four proposed penalty assessments issued to Williams & Sons Slate & Tile, Inc. (“Williams”) that had become final orders 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 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).

The Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued the following proposed assessments to Williams on the dates noted: A.C. No. 36-07156-45867 (PENN 2006-78-M), issued on December 16, 2004; A.C. No. 36-07156-47898 (PENN 2006-75-M), issued on January 13, 2005; A.C. No. 36-07156-67440 A (PENN 2006-76-M), issued on September 15, 2005; and A.C. No. 36-07156-70601 (PENN 2006-77-M), issued on October 28, 2005. When Williams failed to timely contest the proposed penalty assessments, the proposed assessments became final orders of the Commission by operation of section 105(a) of the Mine Act.

Williams subsequently filed a motion requesting the Commission to reopen the penalty assessments. On February 27, 2006, the Commission issued an order remanding the matter to the Chief Judge for a determination of whether good cause existed for Williams’ failure to timely contest the penalty proposals and whether relief from the final orders should be granted. *Williams & Sons Slate & Tile, Inc.*, 28 FMSHRC 13, 15 (Feb. 2006).

On January 7, 2008, the Chief Judge issued an order reopening the penalty assessments and directing the Secretary to file petitions for assessment of penalty pursuant to 29 C.F.R. § 2700.28. The Judge reopened the orders based on an explanation provided by the operator by sworn statement dated December 26, 2006, that it failed to timely contest the proposed penalty assessments due to its owner’s medical conditions and treatments.

By letter dated January 22, 2008, the Secretary informed the Judge that Williams had paid all of the subject civil penalties in full. The Secretary further stated that the operator did not wish to pursue the cases further. Based upon these representations, the Judge issued orders dismissing these proceedings on January 26, 2009. Pursuant to section 113(d) of the Mine Act, the Judge’s dismissal orders became final orders of the Commission 40 days after their issuance, on March 9, 2009. 30 U.S.C. § 823(d)(1).

On September 15, 2009, the Commission received a request to reopen the dismissal orders from the Secretary. The Secretary explains that she recently ascertained that the penalties had not, in fact, been paid by the operator. Rather, MSHA had misapplied payments from another company with a similar name to Williams’ account. The operator has not responded to the Secretary’s motion.

Having reviewed the Secretary’s motion, we remand this matter to the Chief Judge for a determination of whether the dismissal orders should be reopened. If it is determined that relief from the final orders is appropriate, this case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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