

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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December 16, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2009-546
v.	:	A.C. No. 36-07230-171630
	:	
CONSOL PENNSYLVANIA	:	
COAL COMPANY	:	

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 June 8, 2009, the Commission received a motion by counsel for Consol Pennsylvania Coal Company (“Consol”) 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 16, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000171630 to Consol, proposing civil penalties for 70 citations issued to the operator at its Bailey Mine during the preceding two months. Consol states that its then superintendent at the mine, who normally received assessments and forwarded them to the safety department for further action, was on vacation around the holidays when the assessment at issue arrived. Consol further explains that the mine was idle for the holiday week, and that the safety director did not receive the assessment until January 22, 2009. According to Consol, at that point the safety director affixed a cover sheet indicating his mistaken belief that the assessment had been received just that day. After Consol sent its notice to MSHA that it was contesting 11 of the penalties on January 29, 2009, MSHA rejected the contest as untimely.

The Secretary of Labor does not oppose the motion to reopen.

Certain factors weigh in favor of granting the motion to reopen, i.e., the Secretary does not oppose it and the contest was eventually filed only four days late. However, Consol, after learning of MSHA's February 23, 2009, rejection of its notice of contest, waited more than three months to file its motion to reopen. Under Rule 60(c), a motion to reopen, regardless of its merit, is only granted if it is filed within a reasonable time. In the context of penalty assessments, in considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice from MSHA or other notice of default and the operator's filing of its motion to reopen, as well as the reason for any delay. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009).

Having reviewed Consol's request and the Secretary's response, we conclude that Consol has failed to explain the delay in responding to MSHA's rejection of its notice of contest and therefore has not provided the Commission with an adequate basis to reopen. *See, e.g., Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). Accordingly, we deny without prejudice Consol's request to reopen.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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