

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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December 15, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2010-177-M
v.	:	A.C. No. 40-00168-175532
	:	
EAST TENNESSEE ZINC COMPANY	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On November 30, 2009, the Commission received from East Tennessee Zinc Company (“ETZC”) a motion by counsel 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 February 3, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000175532 to ETZC for fifteen citations that MSHA had issued to the operator in December 2008. MSHA also issued Proposed Assessment No. 000175533 to ETZC on February 3, 2009. ETZC states that upon receipt, it forwarded both proposed assessments to counsel to have contests filed as to each, but that "during subsequent administrative handling of the cases, Case No. 000175533 was contested, but inadvertently Case No. 000175532 was not." Mot. at 2. ETZC asserts that it discovered it was delinquent upon consulting MSHA's data retrieval system. *Id.* On December 24, 2009, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

Having reviewed ETZC's request and the Secretary's response, we conclude that ETZC has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. The operator's explanation that it failed to file a timely contest due to "administrative oversight" by counsel (Mot. at 2), without any further elaboration, does not provide us with an adequate basis to justify reopening the assessment. We note in particular that ETZC fails to provide any explanation for its inaction during the prolonged period of over eight months between the assessment becoming a final order and the filing of the motion to reopen. Accordingly, we deny without prejudice ETZC's request. *See, e.g., Eastern Associated Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

Any amended or renewed request by ETZC to reopen Assessment No. 000175532 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

Commissioner Duffy, dissenting:

I would grant this unopposed motion to reopen. In the past the Commission has denied a motion to reopen because of the operator's delay in seeking relief after having been notified by the Secretary of its delinquency. Here, there is no evidence that a delinquency notice was sent prior to the operator's discovery of the delay upon its own investigation. On the basis of that distinction and the Secretary's non-opposition, the motion should be granted

Michael F. Duffy, Commissioner

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