FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 16, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2010-469-M
v.	:	A.C. No. 09-00188-198565
C-E MINERALS	:	

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 1, 2010, the Commission received from C-E Minerals ("C-E") a request 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 Proposed Assessment No. 000198565 to Mullite Company of America, proposing a civil penalty for one citation. In its letter seeking reopening, C-E states that the "citation was contested and appears in [MSHA's] Mine Data Retrieval System as contested[,] but apparently was not received within the 30 day allowed time frame." The operator further provides its defense of the violation. C-E does not explain the relationship between it and Mullite Company of America.

On March 18, 2010, the Commission received a response from the Secretary of Labor stating that she opposes the operator's request to reopen the assessment. The Secretary states that the proposed assessment was delivered to, and signed for by, the operator on October 6, 2009. Attached to the Secretary's opposition is a copy of MSHA's delinquency notice dated December 23, 2009. The Secretary states that the operator did not mail its contest until December 29, 2009, and fails to explain why it did not contest the assessment within 30 days.

Having reviewed C-E's request to reopen and the Secretary's response, we conclude that the operator has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. C-E's statement that it contested the citation is inconsistent with the record. According to the Secretary, C-E's contest was filed more than a month and a half after the proposed assessment became a final order. In addition, C-E's failure to explain why it did not contest the proposed assessment on time does not provide the Commission with an adequate basis to reopen. Furthermore, C-E has failed to explain why it delayed approximately two months in responding to the delinquency notice sent by MSHA.[1] Accordingly, we hereby deny without prejudice C-E's request. *See Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009); *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008).

[1] In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 10-11 (Jan. 2009).

The words "without prejudice" mean C-E may submit another request to reopen this case so that it can contest the penalty assessment.[2] Any such request must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

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[2] If C-E submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the 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. C-E should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. C-E should also submit copies of supporting documents with its request to reopen. C-E should further explain in similar detail why it delayed in responding to MSHA's delinquency notice. In addition, C-E should explain the relationship between it and Mullite Company of America. Finally, C-E should discuss whether it has already paid the penalty proposed by the Secretary.

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