

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 21, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2010-477
v.	:	A.C. No. 01-02901-198781
	:	
DRUMMOND COMPANY, INC.	:	

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 March 3, 2010, the Commission received from Drummond Company, Inc., a letter 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). On April 1, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge 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. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Patrick K. Nakamura, Commissioner

Commissioner Cohen, dissenting:

I cannot agree with my colleagues' determination that the motion filed by Drummond Company is sufficient to reopen a penalty assessment that has become final under section 105(a) in this case.

I conclude that Drummond has failed to provide a sufficient explanation for its failure to timely contest the proposed penalty assessment. In the letter, Drummond's counsel's explained that on the day that company management directed him to contest the citations in the proposed assessment, he was with his wife, who was in the hospital undergoing surgery. Over the next several days, counsel cared for his wife as she recovered. He then states, "[d]uring that time, the email eluded my notice, and, as a result, I was unaware of its existence and did not file the notice of contest in a timely manner."

MSHA issued the Proposed Assessment in this case on September 30, 2009. Drummond filed its motion to reopen on March 2, 2010. Presumably during those five months, MSHA sent Drummond the usual delinquency notice informing the company that the proposed assessment had become a final order of the Commission. Although neither Drummond nor the Secretary has furnished us the delinquency notice in this case, I would assume from experience that it would have been sent around the middle of December 2009.

Although counsel's losing track of management's email to him as he was caring for his wife is both understandable and excusable, it does not account for the five-month delay between the issuance of the proposed assessment, nor does it account for Drummond's inaction upon receiving the delinquency notice from MSHA. Hence, I conclude that grounds for reopening have not been established. See *C.S.A. Mining, Inc.*, 31 FMSHRC 773, 775 (July 2009); *Higgins Stone Co.*, 32 FMSHRC 33, 34-35 (Jan. 2010). The Commission should deny this motion without prejudice.

Robert F. Cohen, Jr., Commissioner

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