FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 27, 2009

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2008-384
v.	:	A.C. No. 44-07181-140627
THE BANNER COMPANY, LLC	:	

BEFORE: Duffy, Chairman; Jordan, 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 August 4, 2008, the Commission received from The Banner Company, LLC ("Banner") a motion by counsel 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).

On February 14, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued proposed penalty assessment No. 000140627 to Banner, covering Citations Nos. 6635214 and 7318977. On May 14, 2008, MSHA sent Banner a letter indicating that the penalty had become delinquent. In its motion, Banner asserts that its safety director believed he had contested the two penalties associated with the two citations at issue. It alleges that the failure to contest the penalties "arose either by [Banner's] inadvertence or mistake or MSHA's failure to accurately process [the penalty assessment form]."

The Secretary states that she opposes the reopening of the proposed penalty assessment on the grounds that the operator's conclusory statement that its safety director intended to contest the penalty assessment is insufficient to warrant reopening. She further notes that

MSHA has no record that it ever received a contest of the penalty assessment and the operator provides no evidence that it ever filed such a contest. The Secretary also states that the operator failed to explain why, given that the notice of delinquency was issued in May 2008, the operator did not submit its motion to reopen until August 2008.

We have held 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 Banner's request and the Secretary's response, we agree with the Secretary that Banner has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment, and submit its motion to reopen. Banner's conclusory statement that it believed it had contested the proposed penalty assessment does not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny without prejudice Banner's request. *See, e.g., Eastern Associated Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr*., 29 FMSHRC 569, 570 (July 2007).

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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