

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
SUITE 9500  
WASHINGTON, DC 20001

September 24, 2009

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

OLD DOMINION ENERGY, INC.

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Docket No. VA 2009-270  
A.C. No. 44-07074-169050

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 May 8, 2009, the Commission received from Old Dominion Energy, Inc. (“Old Dominion”) 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 November 13, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000169050 to Old Dominion, which proposed civil penalties for 24 citations. Old Dominion states that it intended to contest the penalties for Citation Nos. 6641802, 6641805, 6641806, 6641807, 6641808, 6641816, 6641817, and 6638021 and to pay the remaining penalties.<sup>1</sup> It further states that on November 25, 2008, it submitted its contest of the eight penalties to MSHA's Civil Penalty Compliance Office, and on December 10, 2008, sent a check to MSHA for the remaining penalties. The operator submits that it became aware that the penalties had not been contested when it received a notice of delinquency from MSHA. It explains that funds from the payment it made were misapplied to some of the citations which it intended to contest, and other penalties which it intended to pay are shown as delinquent.

The Secretary states that she does not oppose the reopening of the proposed penalty assessment. She notes, however, that while the payment was received at MSHA's payment processing center, there is no record that the penalty contest form was received by MSHA's Civil Penalty Compliance Office.

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<sup>1</sup> The operator's counsel has confirmed that the operator intended to contest the penalties associated with these citations, as the citation numbers are listed in the proposed assessment attached to Old Dominion's motion to reopen. Some of the citation numbers set forth in the motion were transposed.

Having reviewed Old Dominion's request and the Secretary's response, in the interests of justice, 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.

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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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