

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 27, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2009-438
v.	:	A.C. No. 44-06685-182176
	:	
BANNER BLUE COAL COMPANY	:	

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 September 24, 2009, the Commission received from Banner Blue Coal Company (“Banner”) 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 April 14, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000182176 to Banner, which listed proposed penalties for 34 citations. In a detailed submission, the operator states that it intended to contest the proposed penalties for nine of those citations but that it failed to do so in a timely manner. The operator's safety director states in an affidavit that, on May 14, 2009, the proposed assessment form was completed and forwarded to the human resources department, and, on May 15, the form was forwarded to the accounts payable department along with four other matters. The safety director states that, at this time, the corporate headquarters was being moved, and that the subject proposed assessment "was lost in the shuffle." He submits that the mistake was discovered two months later and that the contest was mailed to MSHA on July 24, 2009. The operator states that MSHA notified Banner that its contest was untimely by letter dated August 13, 2009. After receiving the letter, Banner investigated the matter and filed its request to reopen.

The Secretary responds that she does not oppose the operator's request to reopen. She notes, however, that a delinquency notice was mailed to the operator on July 9, 2009.

Having reviewed Banner'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 2700.¹ 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

Robert F. Cohen, Jr., Commissioner

¹ The Commission has previously recognized that an operator's failure to respond to a delinquency notice may constitute grounds for dismissal with prejudice. *See, e.g., Newmont USA Ltd.*, 31 FMSHRC 862, 863 n.2 (Aug. 2009). It has explained that, accordingly, an operator who does not explain why, after it was informed of a delinquency, it took as long as it did to request reopening, does so at its peril. *Id.* We have encouraged parties seeking reopening to provide further information in response to pertinent issues raised in the Secretary's response. *Id.* Here, Banner did not file a reply to the Secretary's response explaining whether it received the delinquency notice. It appears, however, that Banner filed its contest of the proposed penalty close to the time that the delinquency notice was issued. In addition, it appears that Banner filed its request to reopen within a reasonable time after receiving MSHA's August 13 letter.

Distribution:

Matthew H. Nelson, Esq.
Dinsmore & Shohl, LLP
215 Don Knotts Blvd., Suite 310
Morgantown, WV 26501

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021