

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 30, 2009

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

v.

THE BANNER COMPANY, LLC

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Docket No. VA 2009-90
A.C. No. 44-07181-159712

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 December 5, 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).

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).

The record indicates that the operator submitted its contest to the proposed penalty assessment one day late due to confusion about the due date.¹ The Secretary states that she does not oppose reopening the proposed penalty assessment.

¹ The operator submits that its contest of the proposed penalty assessment was timely because the time for response was extended by five days under Commission Procedural Rule 8(b). 29 C.F.R. § 2700.8(b) (providing in part that “[w]hen a party serves a pleading by a method of delivery other than same-day service, the due date for party action in response is extended 5 additional calendar days”). We reject the argument. Section 105(a) of the Mine Act requires that an operator notify the Secretary of a penalty contest “within 30 days from the receipt of the notification issued by the Secretary.” 30 U.S.C. § 815(a). Similarly, the Secretary’s regulations, 30 C.F.R. § 100.7(c), and the Commission’s regulations, 29 C.F.R. § 2700.27, both plainly provide that to be timely, an operator’s notice of contest must be submitted within 30 days of receipt of the proposed penalty assessment. The extension allowed under Rule 8(b) applies to responsive pleadings and, as the Secretary asserts, a proposed penalty assessment is not a pleading. Moreover, since the 30-day time period for responding to a proposed assessment begins to run upon *receipt* by the operator, the method of service chosen by MSHA for delivering the proposed assessment does not reduce the operator’s 30-day period.

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. 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

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