

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 22, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 2009-1098-M
	:	A.C. No. 24-01467-182351
GENESIS, 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 July 13, 2009, the Commission received from Genesis, Inc. (“Genesis”) a motion by counsel seeking to reopen a penalty assessments 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 15, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000182351 to Genesis. Genesis states that prior to receiving the proposed assessment, it requested a safety and health conference on the underlying citations in a phone conversation with an MSHA conference and litigation representative. Genesis states that it was informed to submit its request in writing and that the conference might be delayed until penalties were proposed. Genesis also states that, after receiving the proposed assessment, it subsequently submitted a letter to MSHA's Regional Office in Denver, Colorado, indicating that it wished to contest the citations and requesting a conference. Genesis states that its safety director believed that this was adequate to contest the proposed assessment as well, based on his conversation with MSHA. Genesis further states that on June 5, 2009, its accounting department submitted the proposed assessment to MSHA with payment for the violations it did not wish to contest. The Secretary wrote Genesis on June 24, 2009, and notified the operator that its hearing request of June 5, 2009 was untimely. Genesis explains that it only realized that it had not successfully contested the proposed assessment when it received this letter from MSHA on or after July 1, 2009.

The Secretary opposes reopening the proposed penalty assessment, maintaining that the operator provides no reason why the fact that it requested a conference should excuse its failure to contest the proposed assessment in a proper and timely manner. The Secretary points to MSHA's regulations, the Commission's procedural rules, the Mine Act and the proposed assessment as unequivocally indicating that an operator is required to contest the proposed assessment within 30 days of receipt.

The Commission finds that Genesis has established that, although its formal contest of the proposed assessment on June 5, 2005 was late by approximately two weeks, the failure resulted from inadvertence or mistake. Genesis believed that its previous, very detailed, letter of May 14, 2009 was sufficient to affect the contest. Moreover, Genesis acted very promptly in submitting its request to reopen the assessment.

Having reviewed Genesis' 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

Patrick K. Nakamura, Commissioner

Distribution:

Karen L. Johnston, Esq.
Jackson Kelly, PLLC
1099 18th Street, Suite 2150
Denver, CO 80202

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