

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

April 26, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2009-1273-M
v.	:	A.C. No. 02-03045-183807
	:	
CRAIG’S OPERATED	:	
EQUIPMENT	:	

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 August 20, 2009, the Commission received from Craig’s Operated Equipment (“Craig’s Equipment”) a letter seeking to reopen a penalty assessment issued to the operator 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 29, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000183807 to Craig's Equipment for seven citations and orders MSHA had issued to the operator on March 17, 2009. MSHA asserts that the proposed assessment was delivered by Federal Express on May 5, 2009. On July 21, 2009, MSHA sent a delinquency notice to Craig's Equipment. On August 20, 2009, Craig's Equipment sent a request to the Commission seeking to dispute the penalties for six of the seven citations contained on the proposed assessment at issue.

The Secretary opposes the request to reopen on the ground that the operator has failed to explain or provide any reason as to why it did not contest the proposed assessment within 30 days after receiving it.

Having reviewed Craig's Equipment's request to reopen and the Secretary's response, we agree with the Secretary that Craig's Equipment has failed to provide an explanation for its failure to timely contest the proposed penalty assessment. Craig's Equipment has submitted no justifications for its failure to contest the proposed penalty within 30 days of receiving it and therefore has not provided the Commission with an adequate basis to reopen. Accordingly, we deny without prejudice Craig's Equipment's request. *See, e.g., BRS Inc.*, 30 FMSHRC 626, 628 (July 2008); *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008). The words "without prejudice" mean Craig's Equipment may submit another request to reopen the case so that it can contest the citation and penalty assessment.¹ Any amended or renewed request by Craig's Equipment to reopen Assessment No. 000183807 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

¹ If Craig's Equipment submits another request to reopen the case, it must establish good cause for not contesting the citation and proposed assessment within 30 days from the date it received the proposed penalty assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Craig's Equipment should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented Craig's Equipment from responding within the time limits provided in the Mine Act, as part of its request to reopen the case. Craig's Equipment should also include copies of all documents supporting its request to reopen the case.

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