

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

January 13, 2010

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

v.

XMV, INC.

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Docket No. WEVA 2008-1783
A.C. No. 46-09017-155948

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 4, 2008, and May 26, 2009, the Commission received from XMV, Inc. (“XMV”) requests 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 May 11, 2009, the Commission denied without prejudice XMV's request on the basis that the operator had failed to provide a "sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment." *XMV, Inc.*, 31 FMSHRC 523, 525 (May 2009). On May 22, 2009, XMV filed a second motion to reopen the penalty assessment with affidavits and documentation that fully explain the reason for its delay in contesting the assessment. XMV described a miscommunication between it and its counsel as to whether the operator's Safety Director or counsel would file the notice of contest. This occurred at a time when the Safety Director was extremely busy addressing a problem involving a section 104(b) withdrawal order at the mine. Operator's counsel discovered the delinquency three weeks after it occurred, and promptly requested reopening. The Secretary has not opposed the requests to reopen.

Having reviewed XMV's requests and the Secretary's response, in the interest 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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