

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 11, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 2008-1783
	:	A.C. No. 46-09017-155948
XMV, INC.	:	

BEFORE: Duffy, Chairman; Jordan, 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, the Commission received from XMV, Inc. (“XMV”) a letter 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).

On July 7, 2008, the Department of Labor’s Mine Safety and Health Administration issued Proposed Penalty Assessment No. 000155948 to XMV, proposing civil penalties for a citation and several orders. In its request, XMV asserts that it did not file a timely contest due to a misunderstanding between the operator and its law firm regarding who was responsible for contesting the assessment.¹ The Secretary states that she does not oppose XMV’s request to

¹ We note that XMV also failed to file a timely contest of two proposed assessments issued by MSHA on June 3, 2008. In a request to reopen these penalties, (Docket Nos. WEVA 2009-47 and 48), XMV attributed its failure to unspecified confusion among office employees. In those cases, the Commission denied the requests to reopen without prejudice because XMV had not provided a sufficiently detailed explanation. *XMV, Inc.*, 31 FMSHRC ___, slip op. at 3,

reopen the proposed penalty assessment.

We have held 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 inadvertence or mistake. *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).

In a recent case involving a motion to reopen a penalty assessment, the Commission denied without prejudice an operator’s request which was based on an “unintentional error in the transfer of the Proposed Assessment from [the operator] to counsel” *Atlanta Sand & Supply Co.*, 30 FMSHRC 605, 606 (July 2008). The Commission concluded that the operator failed to “provide sufficient information to determine whether or not good cause may exist to reopen the final order.” *Id.*

Nos. WEVA 2009-47 and 48 (Mar. 18, 2009).

Similarly, XMV has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Its brief assertion that it believed the assessment would be contested by its counsel, while its counsel thought the operator would file the contest, does not provide the Commission with an adequate basis to justify reopening. Because XMV provides no specific facts justifying relief, we deny without prejudice XMV's request.² See *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

² In the event that XMV chooses to refile its request to reopen, it should state with specificity the facts and circumstances it believes would justify reopening the final order and should include any relevant documentation with the request.

Distribution:

M. Scott Meachum, Esq.
Flaherty, Sensabaugh & Bonasso, PLLC
200 Capitol Street, P.O. Box 3843
Charleston, WV 25338-3843

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