

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 12, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2008-1853
v.	:	A.C. No. 46-08804-152682
	:	
MT. VIEW RESOURCES	:	

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 18, 2008, the Commission received a motion seeking to reopen a penalty assessment issued to Mt. View Resources (“Mt. View”) 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).

The Department of Labor’s Mine Safety and Health Administration issued Proposed Penalty Assessment No. 000152682 to Mt. View proposing civil penalties for several citations issued in April 2008. According to James F. Bowman, who filed the motion, Mt. View intended to contest the proposed penalties for nine citations, but failed to timely file its contest of the proposed penalties because the proposed assessment was “misplaced or lost.”¹ He states that the

¹ The request to reopen was sent by James F. Bowman, who describes himself as a “Consultant/Litigator.” Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall into one of the categories in Rule 3(b), which include parties, representatives of miners, an “owner, partner, officer or employee” of certain parties, or “[a]ny other person with the permission of the presiding judge or the Commission.” 29 C.F.R. § 2700.3(b). It is unclear whether Mr. Bowman satisfied the

operator does not dispute proper service of the proposed assessment. He submits, however, that “[s]ome” certified mail is received by Federal Express at the mine site where office personnel has changed “on occasion,” and that the proposed assessment was not received by the company’s accounting department for distribution.

In response, the Secretary opposes Mt. View’s request to reopen. She asserts that the operator’s explanation that the proposed assessment have been misplaced or lost does not qualify as exceptional circumstances that warrant reopening.

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 mistake, inadvertence, surprise, 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).

requirements of Rule 3 when he filed the operator’s request. We have determined that, despite this, we will consider the merits of the operator’s request in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, Mr. Bowman must demonstrate to the Commission or presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seek permission to practice before the Commission or judge pursuant to Rule 3(b)(4).

Having reviewed Mt. View’s motion to reopen and the Secretary’s response, we agree with the Secretary that Mt. View has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Mt. View’s conclusory statement that it failed to timely file because the proposed assessment was misplaced or lost does not provide the Commission with an adequate basis to justify reopening. Nor is an adequate basis provided by Mt. View’s vague statements that “[s]ome” certified mail is received by Federal Express at the mine site where office personnel has changed “on occasion,” and that the proposed assessment was not received by its accounting department for distribution. Accordingly, we deny without prejudice Mt. View’s request.² See, e.g., *Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *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 The words “without prejudice” mean that Mt. View may submit another request to reopen the case so that it can contest penalty assessments. In the event that Mt. View chooses to refile its request to reopen, it should provide additional documentation to support its allegations.

Distribution:

James F. Bowman
P.O. Box 99
Midway, WV 25878

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