

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

April 17, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2009-1
ADMINISTRATION (MSHA)	:	A.C. No. 46-09136-156167
	:	
v.	:	Docket No. WEVA 2009-358
	:	A.C. No. 46-09136-159271
BIG RIVER MINING, LLC	:	

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 October 1 and November 24, 2008, the Commission received from Big River Mining, LLC (“Big River”) motions to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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).

With respect to each of the assessments, which were issued by Department of Labor’s Mine Safety and Health Administration in July and August, 2008, Big River states that it intended to contest several of the proposed penalties on each of the assessments. It explains that due to a change in the company’s safety director position, however, it failed to file the contests, and its new safety director only learned of the delinquencies well after assuming the position. In affidavits, the safety director states that the 1000-79 forms for these two penalty contests were not in the files left by his predecessor, and that he first learned that the assessments had not been

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2009-1 and WEVA 2009-358, each captioned *Big River Mining, LLC*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

contested when he discovered them listed as delinquent in the MSHA Data Retrieval System. The Secretary states she does not oppose Big River's requests to reopen the assessments.

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, 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).

Big River requests that, for each assessment, it “be granted such additional time as required to complete the 1000-179 form to show which of the enforcement actions and penalties it contests.”² However, it is incumbent upon an operator that has failed to comply with the section 105(a) time limit to present to the Commission in its request to reopen the final order not only the basis for reopening, but the specific penalties it wishes to reopen. For the Commission to reopen the orders and grant Big River even more time to consider which penalties it wishes to contest conflicts with the 30-day time limit for both contests of penalties and payment of uncontested penalties.

² Inexplicably, Big River does so in Docket No. WEVA 2009-358 despite attaching to its motion a copy of Assessment No. 000159271 on which over half of the penalties have been checked for contest.

Consequently, we dismiss Big River's requests without prejudice. However, the operator may file an amended request to reopen which includes the specific penalties in each assessment it wishes to contest upon reopening and indicates that it has paid the other penalties.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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