

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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April 27, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2009-1038
	:	A.C. No. 46-08122-170790
	:	
v.	:	
	:	Docket No. WEVA 2009-1039
	:	A.C. No. 46-08904-170801
KWV OPERATIONS, LLC	:	

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 July 10, 2009, the Commission received from KWV Operations, LLC (“KWV”) an amended motion by counsel 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).

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).

In its original motions, filed on March 25, 2009, KWV's vice president stated that he received the assessments and marked the citations that he intended to contest and then forwarded them to KWV's corporate office. KWV asserted that through "inadvertence or mistake" the assessments were not timely returned to MSHA. The Secretary did not oppose reopening the proposed penalty assessments. The Commission subsequently denied the requests to reopen without prejudice because of KWV's failure to provide a sufficiently detailed explanation for its failure to file timely contests. *KWV Operations, LLC*, 31 FMSHRC 613, 615 (June 2009).

The amended request to reopen from KWV includes a more detailed affidavit from the vice-president, who explains that he has further investigated the matter with KWV's corporate office, and that the office may have mistakenly sent the notices of contest to the MSHA address for penalties payments. He further states that KWV has changed its handling procedures for penalty assessments in an attempt to avoid this occurring in the future.

Having reviewed KWV's amended request and the Secretary's original response, in the interests 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.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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