FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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October 13, 2009

SECRETARY OF LABOR,	:	Docket No. WEVA 2009-1348
MINE SAFETY AND HEALTH	:	A.C. No. 46-05978-176931
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2009-1349
	:	A.C. No. 46-05978-177402
	:	
	:	Docket No. WEVA 2009-1350
	:	A.C. No. 46-05978-171680
	:	
	:	Docket No. WEVA 2009-1351
v.	:	A.C. No. 46-05978-168598
	:	
	:	Docket No. WEVA 2009-1352
JACOB MINING COMPANY, LLC	:	A.C. No. 46-05978-165760

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 May 1, 2009, the Commission received from Jacob Mining Company, LLC ("Jacob") a letter seeking to reopen 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

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2009-1348, WEVA 2009-1349, WEVA 2009-1350, WEVA 2009-1351, and WEVA 2009-1352, all captioned *Jacob Mining Company, LLC,* and involving the same procedural issues. 29 C.F.R. § 2700.12. Although Jacob also sought reopening of Assessment No. 000182191, the Secretary indicated in her response that she will treat that proposed assessment as being timely contested and proceed accordingly.

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).

The operator asserts that it failed to contest the proposed assessments in a timely manner because it "was unaware that [it] could contest the fine amounts." It also states that it is unable to pay the proposed penalties and requests reopening so that the penalty amounts may be lowered.

In response, the Secretary states that the operator has failed to make a showing of exceptional circumstances that warrant reopening. She asserts that Jacob has been in business since 2005, and that the proposed assessment forms set forth the procedure for contesting proposed penalties. The Secretary contends that, in any event, ignorance of the rules and law and inability to pay a penalty are not grounds for reopening a proposed penalty that has become final. She also notes that, if the operator wishes to set up a payment plan, it should contact MSHA's Civil Penalty Compliance Office.

Having reviewed Jacob's request to reopen and the Secretary's response, we conclude that Jacob has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments. Jacob's conclusory statement that it was "unaware that [it] could contest the fine amounts" (even though the assessment forms set forth contest procedures) does not provide the Commission with an adequate basis to reopen. In addition, Jacob's statement that it is unable to pay the full penalty amounts does not address the question of why it failed to timely contest the proposed assessments. Accordingly, we hereby deny the request for relief without prejudice. *See FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007). The words "without prejudice" mean that Jacob may submit another request to reopen Assessment Nos. 000176931, 000174402, 000171680, 000168598, and 000165760 so that it can contest the proposed penalties.[2]

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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

[2] If Jacob submits another request to reopen, it must establish good cause for not contesting the citations and proposed penalties within 30 days from the date it received the proposed assessments from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Jacob should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented Jacob from responding within the time limits provided in the Mine Act, as part of its request to reopen. Jacob should also submit copies of supporting documents with its request to reopen.

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