

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

June 16, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 2009-1708
	:	A.C. No. 46-08596-168603
PRITCHARD MINING COMPANY, INC.	:	
	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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 23, 2009, the Commission received from Pritchard Mining Company, Inc. (“Pritchard Mining”) a motion 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).

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).

On November 12, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000168603 to Pritchard Mining. MSHA asserts that the proposed assessment was delivered by U.S. Postal Service on November 24, 2008. On February 9, 2009, MSHA sent a delinquency notice to Pritchard Mining. In its motion, Pritchard Mining states that it timely contested the underlying citations that are the subject of the proposed assessment it now seeks to reopen. Pritchard Mining explains that due to an unspecified "inadvertent error," it did not receive the proposed assessment.

The Secretary opposes the request to reopen and states that the operator has failed to explain why it did not contest the proposed assessment in a timely manner. She also maintains that the operator failed to explain the long delay in filing its request to reopen after it had been notified of the delinquency.

Having reviewed Pritchard Mining's request to reopen and the Secretary's response, we agree with the Secretary that Pritchard Mining has failed to provide an explanation for its failure to timely contest the proposed penalty assessment. Pritchard Mining has submitted no justifications for its failure to contest the proposed penalty within 30 days of receiving it and therefore has not provided the Commission with an adequate basis to reopen. Accordingly, we deny without prejudice Pritchard Mining's request. *See, e.g., BRS Inc.*, 30 FMSHRC 626, 628 (July 2008); *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008).¹ Any amended or

¹ The words "without prejudice" mean Pritchard Mining may submit another request to reopen the case so that it can contest the citation and penalty assessment. If Pritchard Mining submits another request to reopen the case, it must establish good cause for not contesting the proposed assessment within 30 days from the date it received the assessment 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. Pritchard Mining should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented Pritchard Mining from responding within the time limits provided in the Mine Act, as part of its request to reopen. Pritchard Mining should also include copies of all documents supporting its request to reopen.

In any such request Pritchard Mining must also address why it did not file its request to reopen until more than five months after the MSHA notice should have alerted it to its delinquency. In the context of penalty assessments, in considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice or other notification from MSHA and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009). Since the time Pritchard Mining filed its request, the Commission has held that any request to reopen filed more than 30 days after the receipt of such a notice is grounds for

renewed request by Pritchard Mining to reopen Assessment No. 000168603 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

denial of that request. *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009).

In the contest proceedings related to the proposed assessment Pritchard Mining seeks to reopen, Docket Nos. WEVA 2009-49-R thru WEVA 2009-65-R, on January 25, 2010, the Chief Administrative Law Judge issued an Order to Submit Information, ordering the contestant to submit in writing the status of the citations within 20 days of the Judge's order or the cases would be dismissed. To date, Pritchard Mining has submitted no response. In addition to addressing its failure to timely contest the proposed assessment and timely act in response to the delinquency notice, Pritchard Mining must also explain why it failed to respond to the Judge's order in the related contest proceedings.

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