

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 18, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2009-47
ADMINISTRATION (MSHA)	:	A.C. No. 46-08131-152112
	:	
v.	:	Docket No. WEVA 2009-48
	:	A.C. No. 46-08845-152118
XMV, INC.	:	

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 7, 2008, the Commission received requests to reopen two penalty assessments issued to XMV, Inc. (“XMV”) 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).

On June 3, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued two proposed penalty assessments to XMV. After receiving no response, MSHA sent XMV delinquency notifications on or around August 27, 2008, for the two penalty assessments at issue. According to James F. Bowman, who filed the requests to reopen,² XMV

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2009-47 and WEVA 2009-48, both captioned *XMV, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

² The requests to reopen were 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

failed to timely respond to the proposed penalty assessments because of confusion among those office employees signing for the assessments and the failure to use normal internal document routing procedures, resulting in the failure of the documents to reach the proper offices on a timely basis.

The Secretary states that she does not oppose the reopening of the assessments. She urges the operator to take all steps necessary to ensure that future penalty assessment contests are filed in a timely manner.

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).

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. It is unclear whether Mr. Bowman satisfied the 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 XMV's request and the Secretary's response, we conclude that XMV has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments. Accordingly, we deny without prejudice XMV's request.³ See *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

³ The words "without prejudice" mean that XMV may submit another request to reopen the case so that it can contest penalty assessments. In the event that XMV chooses to refile its requests to reopen, it should disclose with greater specificity, and with appropriate documentation, the reasons for its failure to contest the proposed assessments in a timely manner.

Distribution:

James F. Bowman
Extra Energy, Inc.
P.O. Box 99
Midway, WV 26878

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Douglas N. White, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

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