FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

May 20, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2009-764
	:	A.C. No. 46-08808-166004
v.	:	
	:	
SPARTAN MINING COMPANY, 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 January 29, 2009, the Commission received from Spartan Mining Company, Inc. ("Spartan") 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).

On October 15, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed assessment to Spartan for alleged violations at its Ruby Energy Mine. As Spartan notes in its motion, the assessment proposes $208,985 in penalties for 163 citations and orders. Spartan alleges that it did not receive the Federal Express envelope containing the proposed assessment.[1] Spartan requests that the assessment be reopened as to the

[1] We note, however, that the Fed Ex Tracking Report appears to indicate that when Fed Ex attempted to deliver the package on October 22 and 23, 2008, the customer was not available and/or the business was closed. The full working of the "Details" in the Fed Ex Tracking Report was not provided in the attachment to Spartan's motion.

citations and orders marked on the copy of the proposed assessment it attached to the motion. However, none of the citations or orders was marked on the attached copy.

The Secretary filed a response to the motion stating that she does not oppose it, but pointing out the attached assessment lacked any indication regarding which of the penalties Spartan seeks to reopen.[2] Despite the Secretary pointing out this obvious flaw in the motion, Spartan did not file a reply to the Secretary's response, or submit an amended motion to reopen with a marked assessment. The Secretary also noted in her response that "the proposed assessment was mailed via Federal Express to the address of record at the time of assessment in this case. The operator has since updated its Legal ID Report to indicate a new address that was effective January 21, 2009."

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).

Because Spartan's motion states that it seeks to reopen only some of the penalties as marked on the attached assessment form, but fails to specify which penalties those are, its motion is deficient on its face. Consequently, we deny Spartan's motion without prejudice.

In the event that Spartan refiles this motion, it should include a complete copy of the Fed Ex Tracking Report. It should also describe any circumstances which existed on October 22 and 23, 2008, which may have interfered with delivery of the Fed Ex package containing the

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[2] We consider the Secretary's position in this case in light of the provisions of the "Informal Agreement between Dinsmore & Shohl Attorneys and Department of Labor – MSHA – Attorneys Regarding Matters Involving Massey Energy Company Subsidiaries" dated September 13, 2006. Therein, the Secretary agreed not to object to any motion to reopen a matter in which any Massey Energy subsidiary failed to timely return MSHA Form 1000-179 or inadvertently paid a penalty it intended to contest so long as the motion to reopen is filed within a reasonable time. Thus, we assume that the Secretary is not considering the substantive merits of a motion to reopen from any Massey Energy subsidiary so long as the motion is filed within a reasonable time. Such agreements obviously are not binding on the Commission, and the Secretary's position in conformance with the agreement in this case has no bearing on our determination on the merits of the operator's proffered excuse.

proposed assessment. Additionally, Spartan should explain the discrepancy in the address listed in the Legal ID Report noted by the Secretary.

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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