FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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July 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 June 8, 2009, the Commission received from Spartan Mining Company, Inc. ("Spartan") an amended motion by counsel seeking to reopen a penalty assessment that may have 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 an assessment to Spartan proposing $208,985 in penalties for 163 citations and orders previously issued at Spartan's Ruby Energy Mine. In its initial request to reopen filed on January 29, 2009, Spartan alleged that it did not receive the Federal Express envelope containing the proposed assessment and requested that the assessment be reopened as to the 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. Consequently, the Commission denied Spartan's request without prejudice, and specified information that Spartan should include to further clarify matters in the event it decided to refile its motion. *See Spartan Mining Co.*, 31 FMSHRC ___, ____, slip op. at 2-3 (May 20, 2009).

Spartan filed an amended motion on June 8, 2009, which includes an assessment form marked to show that Spartan would contest 73 proposed penalties upon reopening of the assessment. The amended motion also includes a copy of the Federal Express Tracking Report for the delivery package containing the assessment that MSHA provided to Spartan. The report shows that the delivery company twice tried to deliver the package, both times unsuccessfully. Spartan explains that it is understandable that the first attempt was unsuccessful, because it was made after business hours, but cannot understand why the second attempt also failed, given that it occurred at a time that its office was fully staffed. Spartan states that because of problems with deliveries it has changed its mailing address to a more centralized delivery location.

The Secretary did not oppose Spartan's original request for reopening, and did not respond to its amended motion.[1]

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).

Having reviewed Spartan's amended motion, we conclude that the proposed assessment at issue has not become a final order of the Commission. We deny the motion as moot and remand this matter to the Chief Administrative Law Judge for further proceedings as appropriate, pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Spartan's submission of its completed contest form with its amended motion to reopen serves as its notice of contest. Consequently, and consistent with Rule 28, the Secretary shall file petitions

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[1] 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.

for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28. *See Double Bonus Coal Coo,*, 31 FMSHRC 358, 360 (Mar. 2009).

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

_____
Robert F. Cohen, Jr., Commissioner

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