

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December 10, 2009

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | Docket No. WEVA 2010-144 |
| v. | : | A.C. No. 46-08581-188168 |
| | : | |
| BLUE HAVEN ENERGY, INC. | : | |

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 October 27, 2009, the Commission received from Blue Haven Energy, Inc. (“Blue Haven”) a motion 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 June 16, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000188168 to Blue Haven, proposing penalties for eight citations that had been previously issued to the operator. According to its motion, Blue Haven received the assessment, and its representative marked the form to indicate that it was contesting all the proposed penalties. The notice of contest was apparently mailed on June 27, 2009, using certified mail. According to a copy of the on-line record of delivery submitted by Blue Haven with its motion, the envelope that was mailed was received by MSHA two days later. Nevertheless, the penalties were shown as delinquent on a separate, subsequent assessment, which caused Blue Haven to promptly file its motion to reopen.

The Secretary of Labor states that, while she has no record of receiving the notice of contest, given the information provided by Blue Haven, she will accept the copy of the notice of contest included with Blue Haven's motion. The Secretary states in her letter dated November 17, 2009, that she will file a penalty petition within 45 days of that date.

Having reviewed Blue Haven's motion and the Secretary's response, we find the request to reopen to be moot. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700, and, per her statements, the Secretary's penalty petition shall be filed no later than January 4, 2010.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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