

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

June 4, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2010-195
v.	:	A.C. No. 46-08436-188167
	:	
PERFORMANCE COAL COMPANY	:	

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 November 6, 2009, the Commission received from Performance Coal Company (“Performance”) 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. 000188167 to Performance, proposing penalties for 62 violations totaling \$95,627. According to its motion, after Performance received the assessment, its safety director stamped the date on which he personally received the proposed assessment on the form and forwarded it to Performance's corporate counsel, who mailed the form to MSHA's Civil Penalty Compliance Office within 30 days of the stamp date. Performance was notified of the delinquency when it received a notice from MSHA on or about September 17, 2009, which caused Performance to file its motion to reopen.

The Secretary of Labor, who does not oppose Performance's request, states that MSHA has no record of receiving the notice of contest. She notes that the 30-day period for filing a contest begins to run from the date of the operator's actual receipt of the proposed assessment, not the date on which the operator stamps the form. She also notes that the operator paid the penalties for this case in full by check dated November 6, 2009. The operator did not respond to the Secretary's statement that the penalties in this case have been paid.

Having reviewed Performance's motion and the Secretary's response, we find the request to reopen to be moot. The operator has paid the penalties in full. Accordingly, this case is dismissed. *See Riverton Investment Corp.*, 31 FMSHRC 1067 (Oct. 2009).

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

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