

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 22, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2010-225
ADMINISTRATION (MSHA)	:	A.C. No. 46-08596-177524 HFT
	:	
v.	:	Docket No. WEVA 2010-226
	:	A.C. No. 46-09070-188924 HFT
HARVEY TRUCKING, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On November 10, 2009, the Commission received from Harvey Trucking, Inc. (“Harvey Trucking”) requests to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹ On December 8 and 9, 2009, the Commission received responses from the Secretary of Labor stating that she does not oppose the requests to reopen the assessments.

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

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2010-225 and WEVA 2010-226, both captioned *Harvey Trucking, Inc.*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

In Docket No. WEVA 2010-225, Harvey Trucking states that it mailed a request to reopen Proposed Assessment No. 000177524 on July 6, 2009, and attaches an undated copy of that letter to its current request. In that letter, Harvey Trucking states that it did not receive the proposed assessment because during the time MSHA sent the assessment, its office was closed for a period of time due to an illness. The Secretary, who does not oppose Harvey Trucking’s request, explains that the assessment was delivered on March 3, 2009, and became final on April 2, 2009. On May 20, 2009, MSHA notified the operator that the assessment was delinquent.

In Docket No. WEVA 2010-226, Harvey Trucking contends that it mailed the contest form on August 17, 2009, but according to the Secretary, the assessment had become final on July 30, 2009. On September 17, 2009, MSHA notified the operator that the assessment was delinquent. The Secretary indicates that she does not oppose this request.

Having reviewed Harvey Trucking’s requests to reopen and the Secretary’s responses, we conclude that the operator has not provided sufficiently detailed explanations for its failure to timely contest the proposed penalty assessments. Harvey Trucking’s general statement that the office was closed for a period of time due to an illness does not provide the Commission with an adequate basis to reopen without further elaboration. In Docket No. WEVA 2010-226, Harvey Trucking has failed to provide any explanation for its failure to timely file a contest of the assessment. Furthermore, Harvey Trucking has failed to explain why it delayed approximately six weeks and seven weeks respectively in responding to the delinquency notices sent by MSHA.² Accordingly, we hereby deny without prejudice Harvey Trucking’s requests. *See Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009); *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008).

² In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator’s receipt of a delinquency notice and the operator’s filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 10-11 (Jan. 2009).

The words “without prejudice” mean Harvey Trucking may submit another request to reopen these cases so that it can contest the citations and penalty assessments.³ Any such request must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

³ If Harvey Trucking submits another request to reopen these cases, it must establish good cause for not contesting the citations and proposed assessments within 30 days from the date it received the proposed penalty assessments from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of “good cause” may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Harvey Trucking should include a full description of the facts supporting its claim of “good cause,” including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen these cases. Harvey Trucking should also include copies of all documents supporting its request to reopen these cases.

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