

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 1, 2010

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | Docket No. WEVA 2010-865 |
| v. | : | A.C. No. 46-05121-206639 |
| | : | |
| ROCKSPRING DEVELOPMENT | : | |

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 April 6, 2010, the Commission received from Rockspring Development (“Rockspring”) a letter 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).

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).

In its letter, Rockspring asserts that it did not timely contest the proposed assessment because it had not been received by its safety manager or accounts payable department. However, the Secretary states that the assessment was received on December 28, 2009 and signed for by a G. Merritt, the name listed on Rockspring's Legal ID Report's Address of Record. She attached to her opposition to Rockspring's motion a copy of a FedEx tracking slip to support this assertion. Rockspring provided no response to this submission. It also failed to indicate which of the 48 violations contained in the assessment it seeks to contest.

Having reviewed Rockspring's request and the Secretary's response, we conclude that Rockspring has failed to provide an adequate basis for the Commission to reopen the proposed penalty assessment. Rockspring has failed to explain why it did not timely contest the proposed assessment in light of the Secretary's substantiated claim that the assessment had been received by the operator.

An operator seeking to reopen a proceeding after a final order is effective bears the burden of establishing an entitlement to extraordinary relief. At a minimum, the applicant for such relief must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure. The operator must also identify which specific citations or orders in the assessment it wishes to contest upon reopening. Affidavits from persons involved in and knowledgeable of the situation and pertinent documents should be included with the request to reopen. *Higgins Stone Co.*, 32 FMSHRC 33 (Jan. 2010)

Accordingly, we hereby deny without prejudice Rockspring's request. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that Rockspring may submit another request to reopen the assessment so that it can contest the penalty assessment. Any amended or renewed request by Rockspring to reopen the assessments must be filed within 30 days 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

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