

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 9, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2010-890
	:	A.C. No. 46-01544-206635
v.	:	
	:	
SPARTAN MINING 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 April 9, 2010, the Commission received from Spartan Mining Company (“Spartan”) a motion by counsel 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 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 inadvertence or mistake. *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 December 17, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed assessment to Spartan, which was delivered by Federal Express to the mine's address of record on December 28, 2009. Spartan asserts that it was signed for by a temporary receptionist because the safety director and many of the regular office personnel were out of the office due to the holidays at that time. It states that it is "unknown what [the receptionist] did with the FedEx package." Mot. at 4. In addition, the operator explains that Massey Coal Sales, Inc. ("Massey"), Spartan's parent company, had requested MSHA to deliver all proposed assessments of Massey mines to Massey's corporate legal office. According to Spartan, this procedure was not followed in this case, and the proposed assessment did not make it into Massey's internal process for handling such forms, which also contributed to Spartan's failure to timely contest the assessment. Spartan asserts that it discovered the assessment for the first time on February 12, 2010, and attempted to contest it that same day. On March 10, 2010, MSHA sent Spartan a letter indicating that its contest was unsuccessful. Spartan filed the present motion to reopen within 30 days of receiving this notice.

The Secretary opposes reopening arguing that an inadequate office procedure and conclusory statements as to why the operator filed late are not sufficient grounds for reopening. She also acknowledges that MSHA had agreed to start the address change for all Massey mines as a courtesy to Massey. However, the Secretary notes that it was Massey's responsibility to file an updated address of record, which it had not done at the time of the response.

Having reviewed Spartan's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. We base our decision to reopen on the promptness of the motion to reopen and the operator's attempt to contest the proposed assessment as soon as it was discovered, albeit 16 days late. *See, e.g., Genesis, Inc.*, 32 FMSHRC 770, 771 (July 2010) (reopening when operator filed a formal contest two weeks late by mistake and acted very promptly in submitting its request to reopen the assessment). In addition, there appears to have been an understanding, which the Secretary acknowledges, whereby MSHA was to send the proposed assessments to a central office. This was not done here, which may have contributed to Spartan's failure to timely contest the assessment.¹

¹ We note that the Secretary urges the operator to file the correct legal ID report to avoid such problems in the future.

Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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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