

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

October 21, 2010

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
v. : Docket No. WEVA 2010-992
LONG BRANCH ENERGY : A.C. No. 46-04955-212816

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 May 6, 2010, the Commission received from Long Branch Energy ("Long Branch") 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, 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 March 3, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000212816 to Long Branch proposing penalties for 10 citations, including Citation Nos. 8078978, 8078979, and 8078980. The operator states that it intended to contest the penalties associated with Citation Nos. 8078978, 8078979, and 8078980, but that the assessment form was misplaced. It explains that the failure to timely contest the proposed penalties was "the result of inadvertence or a mistake."

The Secretary opposes the request to reopen. She states that Long Branch's explanation for the failure to file a timely contest is conclusory and thus insufficient to establish grounds for reopening the assessment. The Secretary also notes that the operator has filed another reopening request describing a similar procedural failure.

Having reviewed Long Branch's request, we conclude that the operator has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Without further elaboration, the operator's explanation has not provided the Commission with an adequate basis to reopen. Accordingly, we hereby deny the request for relief without prejudice. *See Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007). The words "without prejudice" mean that Long Branch may submit another request to reopen Assessment No. 000212816.

At a minimum, the operator must provide an explanation of how it normally contests proposed penalties and specific information regarding why that process did not work in this instance. Any amended or renewed request by Long Branch to reopen Assessment No. 000212816 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

Distribution:

Melissa Robinson, Esq.
Jackson Kelly PLLC
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris, Acting Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021