

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December 29, 2010

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

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, and November 15, 2010, the Commission received from Long Branch Energy (“Long Branch”) motions 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 October 21, 2010, the Commission denied without prejudice Long Branch's request on the basis that the operator had failed to provide a "sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment." *Long Branch Energy*, 32 FMSHRC 1220, 1221 (Oct. 2010). The Commission stated that at a minimum, Long Branch "must provide an explanation of how it normally contests proposed penalties and specific information regarding why that process did not work in this instance," and file any amended or renewed request within 30 days of the date of the order. *Id.* at 1222.

On November 12, 2010, Long Branch filed a second motion to reopen the penalty assessment with an affidavit and documentation that explain the reason for its delay in contesting the assessment in much more detail. Long Branch explains that, after receiving the proposed assessment on March 8, 2010, it gathered information about the citations and placed the proposed assessment form on the desk of its president/general manager during the week of March 31 to April 2, 2010. The operator's president/general manager intended to contest Citation Nos. 8078978, 8078979, and 8078980. However, on April 5, 2010, an explosion occurred at the Upper Big Branch mine, which is close to one of Long Branch's mines. The president/general manager became engaged in answering multiple questions regarding how the explosion would impact Long Branch's mine and, as a result, the president/general manager mistakenly failed to timely contest the citations.

The Secretary has not opposed Long Branch's second request to reopen.

Having reviewed Long Branch's requests and the Secretary's response, in the interest 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. 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.

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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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