

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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September 14, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2009-143
v.	:	A.C. No. 18-00781-178016
	:	
HERITAGE COAL & NATURAL	:	
RESOURCES, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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 June 15, 2009, the Commission received a request to reopen a penalty assessment issued to Heritage Coal & Natural Resources, LLC (“Heritage”) 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, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Assessment No. 000178016 to Heritage, proposing penalties for two citations and two orders MSHA had previously issued to the operator. Heritage, which neither paid nor contested the penalties, states that it would like to reopen the assessment because it had requested but never received a conference with MSHA on the citations and orders and the operator's alleged negligence.

The Secretary opposes Heritage's request to reopen. She states that MSHA has no record of a request for a conference by Heritage, and that in any event a request for a conference does not toll the 30 days an operator has in which to contest proposed penalties.

Having reviewed Heritage's request and the Secretary's response, we conclude that Heritage has failed to provide an adequate explanation for its failure to timely contest Proposed Assessment No. 000178016. Accordingly, we deny without prejudice Heritage's request to reopen. The words "without prejudice" mean Heritage may submit another request to reopen so that it can contest the citations, orders, and penalty assessments.¹

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

¹ If Heritage submits another request to reopen, it must establish good cause for not contesting the citations, orders, and proposed penalties 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. Heritage should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem involving a conference request prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen the case. In addition, Heritage should submit copies of supporting documents with its request to reopen the case.

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