

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 12, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 2007-228-M
	:	A.C. No. 29-01899-114181
	:	Docket No. CENT 2007-229-M
	:	A.C. No. 29-01899-99835
	:	Docket No. CENT 2007-230-M
v.	:	A.C. No. 29-01899-102372
	:	Docket No. CENT 2007-231-M
	:	A.C. No. 29-01968-112533
	:	Docket No. CENT 2007-232-M
JAMES HAMILTON CONSTRUCTION	:	A.C. No. 29-00708-99064 AB8

BEFORE: Duffy, Chairman; Jordan and Young, 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. (2000) (“Mine Act”).¹ On May 29, 2007, the Commission received from James Hamilton Construction (“Hamilton”) a motion by counsel seeking to reopen penalty assessments that had become final orders 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).

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2007-228-M, CENT 2007-229-M, CENT 2007-230-M, CENT 2007-231-M, and CENT 232-M, all captioned *James Hamilton Construction*, and all involving similar procedural issues. 29 C.F.R. § 2700.12.

During 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued numerous citations to Hamilton. In Hamilton's motion to reopen, counsel states that "due to clerical error, mistake and excusable neglect, the citations were misplaced and not timely responded to." In addition, counsel states that Hamilton wishes "to contest the citations and/or the proposed assessments at this time." In response, the Secretary states that she does not oppose reopening the dockets included in this proceeding but clarifies her understanding as to a citation that was not included. She also states that penalties in two of the dockets have been paid.

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).

Having reviewed Hamilton's motions to reopen, we deny without prejudice Hamilton's request. Hamilton has failed to provide any specific explanation to justify its failure to timely contest the proposed penalty assessments. *See Marsh Coal Co.*, 28 FMSHRC 473, 475 (July 2006). Moreover, rather than including a precise listing of the citations associated with the individual penalty assessments from which it seeks relief, Hamilton has included an extensive list of citations, many of which are apparently not within the scope of relief sought by its motion. The list of citations is, at best, confusing, and there is *no* identification of the corresponding penalty assessments from which relief is sought.

In the event that Hamilton chooses to refile this motion, it should disclose with specificity the grounds for relief from the final orders of the Commission and what citations and associated penalties are included in the request for relief.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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