FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 26, 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 2007-230-M
v.	:	A.C. No. 29-01899-102372
	:	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"). On October 23, 2007, the Commission received from James Hamilton Construction ("Hamilton") an amended 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). On July 12, 2007, the Commission had denied without prejudice Hamilton's first request to reopen penalty assessments that had become final orders. *James Hamilton Construction*, 29 FMSHRC 569.[1] The Commission instructed that if Hamilton chose to refile the motion to reopen, it should set forth an explanation to justify its failure to timely contest the proposed penalty assessments and to disclose with specificity what citations and associated penalties are included in the request for relief. 29 FMSHRC at 570-71.

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] In our July 12, 2007 order, we also consolidated docket numbers CENT 2007-228-M, CENT 2007-230-M, and CENT 2007-232-M, along with docket numbers CENT 2007-229-M and CENT 2007-231-M. Docket numbers CENT-229-M and CENT 2007-231-M are apparently not at issue in the present proceeding, and we therefore unconsolidate those two cases.

During 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued numerous citations to Hamilton.[2] In Hamilton's amended motion to reopen and attached affidavit, Hamilton states that it failed to timely contest the citations and proposed penalties at issue because its safety director was engaged in air quality compliance matters that required his immediate attention and, when he turned to the penalty proposals, he discovered that the time to respond had passed.[3] In response, the Secretary states that she does not oppose reopening the proposed penalty proceedings. She also states that penalties in CENT 2007-232-M 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).

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[2] Because neither party has submitted the proposed penalty assessments at issue, we are unable to determine how long Hamilton waited before bringing a motion to reopen the penalty assessments. If Hamilton brought its motion more than a year after the proposed penalty assessments became final Commission orders, its request may be untimely. Under Federal Rule of Civil Procedure 60(b), any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect, not more than one year after the order was entered. *E.C. Voit & Sons*, 29 FMSHRC 957, 958 (Dec. 2006).

[3] We note wording problems with the motion and affidavit because the operator states at various points that it seeks to re-open the "citations" at issue. However, at this juncture in the proceedings, Hamilton is actually seeking to re-open the proposed penalties that are associated with the citations. Additionally, the reasoning provided in the motion and affidavit is problematic because the operator seeks to re-open citations that were issued from April 2006 to September 2006. Presumably the associated penalty proposals also were issued over a number of months, and we question whether Hamilton's safety director could have been solely occupied with one matter for such a long period of time.

Having reviewed Hamilton's amended motion to reopen, in the interest of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Hamilton's failure to timely contest the penalty proposals and whether relief from the final orders should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

Distribution:

Jeffrey A. Dahl, Esq.
Keleher & McLeod, P.A.
P.O. Box 506
Albuquerque, NM 87103-0506

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

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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