

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

May 16, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 2008-347-M
	:	A.C. No. 29-01968-121878
v.	:	
	:	
JAMES HAMILTON CONSTRUCTION	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners<sup>1</sup>

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 March 4, 2008, the Commission received from James Hamilton Construction (“Hamilton”) 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).

On July 18, 2007, Hamilton received Citation No. 6246489 issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). Following receipt of the citation, Hamilton states that it misplaced the citation in a file in another docket and forwarded it to counsel. Hamilton further states that, upon auditing its files, its counsel determined that it failed

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<sup>1</sup> Commissioner Robert F. Cohen, Jr. assumed office after this case had been filed. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Cohen has elected not to participate in this matter.

to contest the proposed assessment because it misplaced the citation.

The Secretary states that she does not oppose the reopening of the assessment. However, she further notes that Hamilton has filed another request to reopen, Docket No. WEST 2008-547-M, that also involves misplacement of documents. The Secretary concludes that Hamilton should take steps to ensure that it timely contests penalty assessments in the future. The Secretary also notes that Hamilton paid the penalty at issue on February 16, 2008.

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 motion to reopen and the Secretary's response thereto, we conclude that Hamilton has failed to provide any specific explanation to justify its failure to timely contest the proposed penalty assessment.<sup>2</sup> Moreover, Hamilton has not submitted a reason why it waited four months after the delinquency letter was issued before it filed its motion seeking relief. Finally, Hamilton has failed to explain why it paid the proposed penalty in full, if it intended to contest it or the underlying citation. Accordingly, we deny without prejudice Hamilton's request. *See James Hamilton Construction*, 29 FMSHRC 569, 570 (July 2007).<sup>3</sup>

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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<sup>2</sup> It appears from the wording of its motion that Hamilton's counsel is confused about the difference between a citation and a proposed penalty assessment. The proposed penalty assessment is the multiple page form that MSHA sends to the operator proposing penalties for alleged violations issued with the listed citation numbers. An operator may contest a proposed penalty assessment simply by indicating on the assessment form which citation numbers it chooses to contest. A citation is a document issued by an MSHA inspector to an operator describing an alleged violation that gives rise to a proposed penalty assessment.

<sup>3</sup> On this date, we similarly deny without prejudice three other requests to reopen where operators have failed to provide meaningful explanations for their failure to timely contest proposed penalty assessments. In the event that Hamilton chooses to refile its request to reopen, it should disclose with specificity its grounds for relief.

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