

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

December 10, 2008

SECRETARY OF LABOR,	:	Docket No. KENT 2008-1207
MINE SAFETY AND HEALTH	:	A.C. No. 15-18747-145685
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2008-1208
	:	A.C. No. 15-18747-142094
	:	
	:	Docket No. KENT 2008-1209
	:	A.C. No. 15-18747-138070
	:	
	:	Docket No. KENT 2008-1210
	:	A.C. No. 15-18747-135133
	:	
	:	Docket No. KENT 2008-1211
	:	A.C. No. 15-18747-132889
	:	
	:	Docket No. KENT 2008-1212
	:	A.C. No. 15-18747-130570
	:	
SOLAR COAL COMPANY	:	Docket No. KENT 2008-1213
	:	A.C. No. 15-18747-128271

v.

BEFORE: Duffy, Chairman; Jordan, 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. (2000) (“Mine Act”). On May 14, 2008, the Commission received from Solar Coal Company (“Solar”) a letter from its owner that was subsequently amended to make clear that Solar is seeking to reopen eight 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). This order addresses the request to reopen as to seven of the assessments.¹

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2008-1207, KENT 2008-1208, KENT 2008-1209, KENT

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).

In her letter to the Commission, in connection with asserting that the proposed penalty amount in a pending proceeding is more than the company can afford to pay, Solar's owner states that "[a]fter examining past citations and reviewing the compan[y's] financial records, I ask that the following cases be reopened and contested to a lower amount due to their outstanding balances." The first seven cases listed are proposed penalty assessments that the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Solar on April 3, 2008 (A.C. No. 145685), on February 28, 2008 (A.C. No. 142094), on January 31, 2008 (A.C. No. 138070), on January 3, 2008 (A.C. No. 135133), on November 29, 2007 (A.C. No. 132889), on November 1, 2007 (A.C. No. 130570), and on October 4, 2007 (A.C. No. 128271).

In response, the Secretary states that inability to pay a penalty is not a grounds for reopening under Rule 60(b) of the Federal Rules of Civil Procedure, and notes that if the operator wishes to set up a payment plan, it should contact MSHA's Office of Assessments.

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).

Because Solar's request for relief does not explain the company's failure to contest the proposed assessments on a timely basis, and is not based on any of the grounds for relief set forth in Rule 60(b), we hereby deny the request for relief without prejudice. *See FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007). The words "without prejudice" mean that Solar may submit

2008-1210, KENT 2008-1211, KENT 2008-1212, and KENT 2008-1213, all captioned *Solar Coal Company* and involving similar procedural issues. 29 C.F.R. § 2700.12. The request to reopen the eighth assessment is docketed at KENT 2008-1214, and is the subject of a separate, concurrently issued, order.

another request to reopen the cases so that it can contest specific citations and penalty assessments.²

In the meantime, in order to narrow the potential scope of a refiled request to reopen, the Secretary should address with Solar whether Solar’s letter, dated May 11, 2008, and sent to MSHA at its address for contests, will be treated by the Secretary as a timely contest of Assessment No. 145685, dated April 3, 2008, and the subject of Docket No. KENT 2008-1207. If Solar’s letter was sent to MSHA within 30 days of Solar’s receipt of that assessment (a date MSHA should have in its records), the letter would not have been an untimely response to the assessment.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

² If Solar submits another request to reopen, it must identify the specific citations and assessments it seeks to contest. Solar must also establish good cause for not contesting the citations and proposed assessments 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 fault on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Solar should include a full description of the facts supporting its claim of “good cause,” including how the mistake or other problem prevented Solar from responding within the time limits provided in the Mine Act, as part of its request to reopen. Solar should also submit copies of supporting documents with its request to reopen.

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