

**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,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. PENN 2008-487
	:	A.C. No. 36-02022-150443
S & M COAL COMPANY	:	
	:	

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 July 18, 2008, the Commission received from S & M Coal Company (“S&M”) 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 May 13, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment of \$58,100 that arose from eight citations and orders issued on September 26, 2007. In his affidavit, S&M’s president states that he had always intended to contest both the penalties and the underlying citations that had been previously docketed. He further states that he failed to return the assessment form because of “inadvertent administrative oversight” and that he believed that the citations were already contested. In its motion, S&M through counsel asserts that it discovered the mistake on July 11, 2008, when the assessment form was discovered in a file where it had been “misplaced.”

The Secretary opposes S&M's motion to reopen. The Secretary argues that S&M has not made a showing of exceptional circumstances justifying relief; rather, the Secretary asserts that the operator has made a conclusory assertion that is insufficient to justify the reopening of a final order. Further, the Secretary states that S&M's motion is not supported by the accompanying affidavit because the operator's motion states a factual assertion which is not contained in the affidavit. Finally, the Secretary asserts that S&M has been delinquent in paying every penalty associated with 88 violations over the last four years. Therefore, the Secretary concludes that S&M has not acted in good faith.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessment forms 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 S&M's request and the Secretary's response, we determine that S&M has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. S&M's president's conclusory statement that an inadvertent administrative oversight resulted in failing to timely contest the penalties does not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny without prejudice S&M's request. *See Eastern Assoc. Coal, LLC*, 30 FMSHRC 392 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).<sup>1</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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Robert F. Cohen, Jr., Commissioner

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<sup>1</sup> In the event S&M chooses to refile its request to reopen, it should disclose with specificity its grounds for relief and address the issue of good faith in seeking relief.

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