

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

October 22, 2008

SECRETARY OF LABOR,	:	Docket No. SE 2008-547-M
MINE SAFETY AND HEALTH	:	A.C. No. 38-00233-134567
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2008-548-M
	:	A.C. No. 09-00721-134513
	:	
v.	:	Docket No. SE 2008-549-M
	:	A.C. No. 09-01015-134514
	:	
	:	Docket No. SE 2008-550-M
DBS, INC.	:	A.C. No. 09-00955-137103

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 April 4, 2008, the Commission received from DBS, Inc. (“DBS”) motions by counsel seeking to reopen four 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).¹

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).

The Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued the four proposed penalty assessments to DBS on December 20, 2007, and January 24, 2008.

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers SE 2008-547-M, SE 2008-548-M, SE 2008-549-M, and SE 2008-550-M, all captioned *DBS, Inc.* and involving similar procedural issues. 29 C.F.R. § 2700.12.

DBS had previously contested the citations contained in those assessments, and the Commission had assigned them the following docket numbers: SE 2008-84-RM, SE 2008-86-RM, SE 2008-87-RM, SE 2008-205-RM, SE 2008-206-RM and SE 2008-207-RM.² DBS asserts that it failed to realize that it needed to contest the penalty proposals in addition to contesting the citations. It states that it became aware that the proposed assessments became final on March 26, 2008, when it received the Secretary's Motion to Dismiss the citation contest cases. In response, the Secretary states that she does not oppose the reopening of the penalty 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).

² We note that DBS failed to timely contest three of the six citations within 30 days of receipt of the citations. *See* 30 U.S.C. § 815(d); Comm. Proc. Rule 20(b), 29 C.F.R. § 2700.20(b). Hence, on July 11, 2008, Chief Administrative Law Judge Robert J. Lesnick issued an Order of Dismissal granting the Secretary's Motion to Dismiss Docket Nos. SE 2008-205-RM, SE 2008-206-RM and SE 2008-207-RM. Unpublished Order dated July 11, 2008 (“Order of Dismissal”). (In a separate order, he denied the Secretary's motion to dismiss the other three citations, finding that the operator's contests were timely filed. Unpublished Order dated July 11, 2008). In the Order of Dismissal, the judge noted that late filing of notices of contest of citations is not permissible under the Mine Act, but that the operator might still be able to contest both the citations and penalties if its motion to reopen the penalty assessments were granted by the Commission.

Having reviewed DBS's motion to reopen and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for DBS'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.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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