

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 28, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2008-278-M
v.	:	A.C. No. 44-00167-114297
	:	
JESSEE STONE 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 May 5, 2008, the Commission received from Jessee Stone Company (“Jessee Stone”) a letter 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 April 3, 2007, the Department of Labor’s Mine Safety and Health Administration issued Proposed Assessment No. 000114297 to Jessee Stone, proposing a civil penalty for Citation No. 6040139. Jessee Stone alleges that the citation is part of an ongoing settlement, and that it was “somehow left out or misplaced.” It further states that it has reached a settlement with MSHA on other citations except Citation No. 6040139.

The Secretary responds that she does not oppose the motion to reopen. She notes, however, that this case was never part of the litigation and settlement agreement in Docket Nos. VA 2007-44-M and VA 2007-14-M. The Secretary further submits that this case was never contested, and that MSHA sent the operator a delinquency notice on July 11, 2007.

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. Under Rule 60(b), any motion for relief from a final order 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. Fed. R. Civ. P. 60(b).

According to documents submitted by the Secretary, the proposed assessment became a final order on May 18, 2007. Jessee Stone’s request for relief from that final order was received by the Commission on May 5, 2008. We have determined, therefore, that the request is not barred by the one year time frame set forth in Rule 60(b).

Although the Secretary does not oppose Jessee Stone’s request for relief, the Secretary’s response makes reference to a delinquency notice dated July 11, 2007, that was sent to Jessee Stone. Jessee Stone’s request makes no reference to the delinquency notice.

Accordingly, having reviewed Jesse Stone's request 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 Jesse Stone's failure to timely contest the penalty proposal and whether relief from the final order should be granted. In considering whether good cause exists, the administrative law judge should consider whether Jesse Stone received MSHA's delinquency notice dated July 11, 2007, and, if so, what action the operator took upon receiving it. If it is determined that 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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