

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

January 8, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-1103-M
	:	A.C. No. 35-00481-131566
v.	:	
	:	
DELTA SAND & GRAVEL CO.	:	

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY: Jordan and Cohen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On June 2, 2008, the Commission received from Delta Sand & Gravel Co. (“Delta”) 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 February 26, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment to Delta for two citations MSHA had issued to Delta in November 2007. Delta requests reopening on the ground that the citations were related to a fatal accident, and Delta intended to contest the penalty assessments, as it later did in the case of another assessment resulting from that accident. Delta states that its failure to contest was due to office personnel not realizing the connection between the assessment and the accident, so they did not forward the assessment to the company’s Risk Manager. Delta alleges it forwarded the assessment through its payment process, but the assessment was never paid, and later Delta received a delinquency notice. The Secretary states that she does not oppose Delta’s request to reopen the penalty.

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).

While Delta’s request for relief addresses the mistake that led to its failure to return the assessment form to MSHA, its motion is silent regarding why the assessment sat apparently unpaid for months, despite having been routed through Delta’s payment process. Consequently, we deny Delta’s request to reopen without prejudice. *Cf. Twentymile Coal Co.*, 30 FMSHRC 177, 178 (Apr. 2008) (denying without prejudice motion to reopen by operator that explained late payment of penalties but failed to address its separate failure to return contest form).

In the event Delta chooses to refile its request to reopen, we would expect it to provide, by submitting affidavits, detailed evidence regarding what happened when the assessment was routed to the payment office and why staff there failed to pay it or forward it to the appropriate personnel.

Mary Lu Jordan, Commissioner

Robert F. Cohen, Jr., Commissioner

Chairman Duffy and Commissioner Young:

Having reviewed Delta's request and the Secretary's response, we would not deny the request on the grounds stated by our two colleagues, but would instead remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Delta's failure to timely contest the penalty proposal and whether relief from the final order should be granted.¹

Michael F. Duffy, Chairman

Michael G. Young, Commissioner

¹ Where two Commissioners have voted to deny without prejudice a request to reopen a case and two Commissioners have voted to remand the case for a determination of whether good cause exists to reopen the case, the effect of the split vote is that the request to reopen is not granted. However, we believe that the party seeking a reopening in such a situation may file a new request to reopen which provides additional support for its position.

Distribution:

Adele L. Abrams, Esq.
Law Office of Adele L. Abrams, P.C.
4740 Corridor Place, Suite D
Beltsville, MD 20705

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021