

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 7, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-375
	:	A.C. No. 05-03836-127865
v.	:	
	:	
TWENTYMILE 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 June 30, 2008, the Commission received from Twentymile Coal Company (“Twentymile”) a motion by counsel requesting that the Commission reopen proceedings involving 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 October 2, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000127865 to Twentymile, proposing penalties for various citations, including Citation No. 7620939. On January 31, 2008, the Commission received from Twentymile a request to reopen so that it could contest the penalty associated with Citation No. 7620939. Twentymile explained that due to a processing error, the penalties that Twentymile was not contesting were not paid until November 2007.

On May 16, 2008, the Commission issued an order denying without prejudice Twentymile's request to reopen.¹ *Twentymile Coal Co.*, 30 FMSHRC 384 (May 2008). The Commission explained that, while Twentymile's request addressed the mistake that led to the late payment of the uncontested penalties, it did not explain the company's separate failure to return the assessment form to MSHA in order to contest the penalty associated with Citation No. 7620939.

On June 30, the Commission received a second motion to reopen from Twentymile. Twentymile alleges that it failed to timely contest the proposed assessment related to Citation No. 7620939 because a Twentymile employee, who does not regularly process proposed assessments, directed that both the payment for uncontested citations and the checked assessment form indicating the contested penalty be sent to the same location.² The Secretary did not file a response to the second motion to reopen.

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).

¹ After a motion to reopen has been denied "without prejudice," a movant has the opportunity to file another request to reopen in order to remedy the procedural defects that led to the denial.

² Payment of a proposed penalty must be sent to MSHA at a St. Louis, Missouri, address, while the form contesting a proposed penalty must be sent to MSHA at an Arlington, Virginia, address.

Having reviewed Twentymile's June 30 request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Twentymile's failure to timely contest the penalty proposal and whether relief from the final order 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

Distribution:

R. Henry Moore, Esq.
Arthur M. Wolfson, Esq.
Jackson Kelly, PLLC
Three Gateway Center
401 Liberty Avenue, Suite 1340
Pittsburgh, PA 15222

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 West
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