

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

July 29, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-879
	:	A.C. No. 05-03836-123538
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 April 21, 2008, the Commission received from Twentymile Coal Company (“Twentymile”) a motion made by counsel 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 July 31, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000123538 to Twentymile, proposing penalties for 33 citations and orders that previously had been issued to the company’s Foidel Creek Mine. On December 10, 2007, Twentymile filed a request to reopen this proposed assessment, stating that the mine promptly processed and forwarded the assessment to Twentymile’s corporate office for payment, but that due to a processing error, the 26 penalties that Twentymile was not contesting were not paid until October 2007. On April 4, 2008, the Commission denied without prejudice Twentymile’s request because it neglected to explain the company’s separate failure to return the assessment form to MSHA in order to contest the seven penalties that it intended to contest. *Twentymile Coal Co.*, 30 FMSHRC 177, 178 (Apr. 2008).

Twentymile now explains that its failure to timely submit its contest of the proposed penalty assessment was due to a change in its internal accounting practice. Twentymile states that under its former procedure, its safety assistant mailed the assessment forms indicating which citations and orders it wished to contest to MSHA, along with payment for the citations and orders it did not wish to contest. Twentymile asserts that beginning in August 2007, the company and its affiliate instituted a new accounting system, which required all payments to be made from its corporate headquarters in St. Louis, Missouri. Twentymile maintains that on August 28, 2007, its safety assistant forwarded the assessment form to the corporate headquarters with a request for payment of the uncontested penalties. It states that due to a processing error involving the new accounting system, its corporate headquarters did not prepare a check for payment until October 17, 2007. Twentymile further states that its safety assistant assumed that the corporate offices submitted to MSHA a check for the penalties it did not wish to contest, along with the proposed assessment form indicating which penalties it sought to contest. It asserts that upon discovering that the contest had not been timely submitted, its safety assistant filed with the Commission a request to reopen the proposed assessment on December 4, 2007, which the Commission denied without prejudice. Twentymile further states that it is now aware that the marked assessment forms and payment for uncontested citations and orders must be submitted separately, and has remedied its practices accordingly. Twentymile asserts that its failure to contest was due to inadvertence, mistake or miscommunication within its organization and requests that the Commission reopen the proposed assessment. The Secretary states that she does not oppose Twentymile's request 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).

Having reviewed Twentymile's motion 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 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

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