

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001

December 22, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-934-M
	:	A.C. No. 45-03338-113621
v.	:	
	:	
PALMER COKING 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 May 1, 2008, the Commission received from Palmer Coking Coal Company (“Palmer”) a letter, dated April 25, 2008, seeking to reopen a penalty assessment that may have 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 March 15, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000113621 to Palmer, which proposed civil penalties for four citations, including Citation Nos. 6396248 and 6396249. Palmer states that on March 26, 2007, its manager mailed its contest of the proposed penalties for Citation Nos. 6396248 and 6396249 to MSHA. MSHA issued a delinquency notice to Palmer on June 22, 2007. Palmer has submitted a copy of a letter to MSHA dated June 25, 2007, in which it alleged that it timely contested the proposed assessment.¹ Palmer alleges further that in October 2007, it

¹ Palmer did not include a copy of its March 26, 2007 submission to MSHA in its submission to the Commission.

received a notice from the U.S. Department of the Treasury stating that it failed to timely contest Proposed Assessment No. 000113621. Palmer submits that it responded by mailing letters to the U.S. Department of the Treasury and to MSHA explaining that its contest had been timely filed.

While the Secretary states that she does not oppose Palmer's request to reopen, she states that she has no record of receiving Palmer's contest of the penalty assessment.

On the record presently before us, we are unable to determine whether Palmer timely contested the proposed penalty assessment. Specifically, it is unclear on what date, between March 15 and 26, 2007, Palmer received the proposed penalty assessment. It is also unclear on what date Palmer contested the proposed assessment, particularly since the Secretary indicates that she has no record of receiving such a contest. If the company timely contested the proposed assessment, the proposed assessment has not become a final order of the Commission and the company's request for relief would be moot. *DS Mine & Dev. LLC*, 28 FMSHRC 462, 463 (July 2006).

If Palmer failed to timely contest the proposed assessment, however, the Commission may not be able to grant the relief requested. *Id.* Under Rule 60(b) of the Federal Rules of Civil Procedure,² 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). Depending upon the date that Palmer received the proposed assessment, the proposed assessment could have become a final Commission order between April 14 and April 25, 2007. Palmer's letter requesting a reopening of the proposed assessment is dated April 25, 2008.³ Thus, Palmer may have requested a reopening of the proposed assessment more than one year after it became a final Commission order. *JS Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004) (denying request to reopen filed more than one year after penalty proposals had become final orders).

² 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). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) 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. *Id.* at 787.

³ MSHA's delinquency notice to the operator lists a final order date of April 29, 2007. There is no indication, however, regarding the manner in which that date was calculated.

Accordingly, we remand this matter to the Chief Administrative Law Judge for a determination of whether Palmer timely contested the proposed penalty assessment at issue. In making this determination, the Chief Administrative Law Judge should obtain from Palmer any proof of mailing of its March 26, 2007, contest of the proposed assessment, or any other documentation (*e.g.*, an affidavit) that supports the operator's assertion that it was mailed on that date. If it is determined that the company did file a timely contest, the Chief Judge shall order further proceedings as appropriate pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. If it is determined that Palmer failed to timely contest the proposed assessment, the Chief Judge shall determine whether to dismiss this proceeding, or whether good cause exists for granting relief from the final order.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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