

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 16, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 2008-488
	:	A.C. No. 46-05295-133374
EASTERN ASSOCIATED COAL, LLC	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners<sup>1</sup>

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 January 31, 2008, the Commission received from Eastern Associated Coal, LLC (“Eastern”) 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 December 5, 2007, the Department of Labor’s Mine Safety and Health Administration issued Proposed Penalty Assessment No. 0000133374 to Eastern, which proposed civil penalties for several citations. In its request, Eastern states that it intended to contest the proposed penalties for five of those citations. It submits that “due to a clerical error,” it failed to timely file

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<sup>1</sup> Commissioner Robert F. Cohen, Jr., assumed office after this case had been filed. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Cohen has elected not to participate in this matter.

its contest of the proposed penalties.

In response, the Secretary states that the operator failed to adequately explain its failure to timely contest the proposed penalty assessment. She requests that the Commission direct the operator to provide a detailed explanation as to why it believes that reopening is warranted.

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 Eastern's motion to reopen and the Secretary's response thereto, we agree with the Secretary that Eastern has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Eastern's conclusory statement that its failure to timely file was due to "clerical error" does not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny without prejudice Eastern's request. *See James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).<sup>2</sup>

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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<sup>2</sup> On this date, we similarly deny without prejudice three other requests to reopen where operators have failed to provide meaningful explanations for their failure to timely contest proposed penalty assessments. In the event that Eastern chooses to refile its request to reopen, it should disclose with specificity its grounds for relief.

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