FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 20, 2009

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2009-1
v.	:	A.C. No. 39-01381-152957
	:	
MORRIS, INC.	:	

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. (2006) ("Mine Act"). On October 1, 2008, and June 12, 2009, the Commission received from Morris, Inc. ("Morris") requests to reopen a penalty assessment that became 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 June 1, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Assessment No. 000152957 to Morris, proposing penalties for two citations that MSHA had previously issued to Morris. According to the Secretary, any contest of those penalties was due on July 17, 2008. However, the Secretary's records show that Morris did not file a contest until July 25, 2008, when it contested one of the two proposed penalties. Because Morris' original request to reopen did not explain the reason for the late filing, the Commission denied the request without prejudice. *See* 31 FMSHRC ___, ___ , slip op. at 2-3 (May 6, 2009).

Morris filed a second request to reopen on June 12, 2009. It explains that on July 2, 2008, well within the 30-day time limit, internal communications indicated that one of the penalties should be paid and the other contested. When it learned on July 17, 2008, that the

instructions had not been carried out, Morris then submitted the check and contest form. Morris includes copies of the assessment showing the internal communications. Morris further states that it has established a new process to ensure that all future notices of contest are submitted in a timely manner.

The Secretary did not oppose Morris' original request for reopening, and did not respond to its second request.

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 mistake, inadvertence, or excusable neglect. *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 Morris' requests and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

_____
Robert F. Cohen, Jr., Commissioner

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