## FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 2, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. LAKE 2008-515
	:	A.C. No. 11-03054-141423
BIG RIDGE, INC.	:	
	:	

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

## <u>ORDER</u>

## 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 July 2, 2008, the Commission received from Big Ridge, Inc. ("Big Ridge") 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 February 14, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed assessment that included penalties of \$143,652 associated with 66 citations. Big Ridge states that, after it received the assessment, the form should have been forwarded through intercompany mail to its safety director, who would have evaluated the penalties and citations. According to Big Ridge, the proposed assessment was "lost" and was not received by the safety director. In a letter dated May 21, 2008, MSHA informed Big Ridge that the civil penalties were delinquent. Big Ridge maintains that it conducted a search for the proposed assessment at the mine and could not locate it.

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In response, the Secretary states that she does not oppose Big Ridge's request to reopen.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessment forms 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 Big Ridge's request 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.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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## Distribution:

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

W. Christian Schumann, Esq.Office of the SolicitorU.S. Department of Labor1100 Wilson Blvd., Room 2220Arlington, VA 22209-2296

Myra James, Chief Office of Civil Penalty Compliance, MSHA U.S. Dept. Of Labor 1100 Wilson Blvd., 25<sup>th</sup> Floor 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