

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001

September 7, 2011

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

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Docket No. PENN 2011-352
A.C. No. 36-09697-242921

v.

GROVE CITY MATERIALS

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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 May 19, 2011, the Commission received from Grove City Materials (“Grove City”) a motion 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).¹ The Secretary does not oppose the request to reopen.

¹The request to reopen was filed by David C. Lewetag, who identifies himself as a consultant for Grove City. Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall in to one of the categories in Rule 3(b), which includes parties, representatives of miners, an “owner, partner, officer or employee” of certain parties, or “[a]ny other person with the permission of the presiding judge or the Commission.” 29 C.F.R. § 2700.3(b). It is unclear whether Mr. Lewetag satisfied the requirements of Rule 3 when he filed the request on behalf of Grove City. We have determined that, despite this, we will consider the merits of the request in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, Mr. Lewetag may represent Grove City only if he demonstrates to the Commission or the presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seeks permission to practice before the Commission or the judge pursuant to Rule 3(b)(4). Otherwise, Grove City must be represented by an attorney or by an owner, partner, officer, or employee.

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).

We have held, however, 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 the facts and circumstances of this case, the operator's request, and the Secretary's response, 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

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