#### FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 6, 2009

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

Docket No. VA 2008-395A.C. No. 44-06444-149645

DICKENSON-RUSSELL : COAL COMPANY, LLC :

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

## ORDER

#### BY THE COMMISSION:

v.

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 20, 2008, the Commission received from Dickenson-Russell Coal Company, LLC ("Dickenson-Russell") a motion made 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).

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).

The Secretary states that she does not oppose reopening the proposed penalty assessment. The record indicates that a recently hired employee of the operator forwarded a check covering all citations covered by a proposed penalty assessment except for two citations which the operator intended to contest. However, the employee inadvertently neglected to file contests for those two penalties. When he learned of his mistake, he belatedly submitted the contest form to the Secretary.

Having reviewed Dickenson-Russell'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
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Robert F. Cohen, Jr., Commissioner

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