FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 13, 2009

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

.

v. : Docket No. VA 2009-354 : A.C. No. 44-06804-179669

KNOX CREEK COAL CORPORATION

:

BEFORE: Jordan, Chairman; Duffy, 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 July 6, 2009, the Commission received from Knox Creek Coal Corporation ("Knox Creek") a request 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).

Knox Creek states that it returned the assessment form to MSHA with the citations that it desired to contest noted on the form. Shortly after Knox Creek received a delinquency letter from MSHA, it submitted its request to reopen to the Commission.

The Secretary does not oppose reopening the proposed penalty assessment but states that there is no record of the penalty contest form having been received by MSHA's Civil Penalty Compliance Office. The Secretary acknowledges receiving payment in this penalty assessment in an amount which, when subtracted from the total proposed assessment, leaves a balance which is the amount of money that Knox Creek claims to have contested.

Having reviewed Knox Creek's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Knox Creek's failure to timely contest the penalty and whether relief from the final order should be granted. If it is determined that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. § 2700.

Mary Lu Jordan, Chairman
Michael F. Duffy, Commissioner
Michael G. Young, Commissioner
Robert F. Cohen, Jr., Commissioner

Distribution:

Sue Mullins, HR Manager Knox Creek Coal Corp. P.O. Box 519 Raven, VA 24639

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., 25th 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