

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

July 11, 2011

SECRETARY OF LABOR,	:	Docket No. WEST 2011-604-M
MINE SAFETY AND HEALTH	:	A.C. No. 04-00167-239737
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2010-1360-RM
v.	:	Citation No. 8560265
	:	
OMYA CALIFORNIA	:	

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

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”).¹ On February 3, 2011, the Commission received a motion by counsel for Omya California (“Omya”) in Docket No. WEST 2011-604-M requesting to reopen a penalty assessment pertaining to Citation No. 8560265 that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On February 18, 2011, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment. While the motion was pending, Chief Administrative Law Judge Robert J. Lesnick dismissed Omya’s contest proceeding pertaining to Citation No. 8560265 (Docket No. WEST 2010-1360-RM) on the basis that the penalty assessment was never contested. On June 20, 2011, the Commission received a motion to rescind dismissal arguing that the proceeding had been erroneously dismissed due to clerical error.

We treat Omya’s motion to rescind dismissal as a petition for discretionary review and grant it. We conclude that, because Omya was in the process of contesting the penalty assessment, the dismissal was premature. Accordingly, the contest proceeding in Docket No. WEST 2010-1360 is hereby reinstated.

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2010-1360-RM and WEST 2011-604-M, both captioned *Omya California* and both involving similar issues. 29 C.F.R. § 2700.12.

With respect to Docket No. WEST 2011-604-M, 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 requests, and the Secretary's response, we hereby reopen the penalty proceeding contained in Docket No. WEST 2011-604-M 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. In addition, we vacate the order of dismissal issued in Docket No. WEST 2010-1360-RM.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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