

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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April 27, 2009

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. WEVA 2008-965 |
| ADMINISTRATION (MSHA) | : | A.C. No. 46-09084-139807 |
| | : | |
| v. | : | Docket No. WEVA 2008-966 ¹ |
| | : | A.C. No. 46-09084-139809 |
| HARVEST-TIME COAL, INC. | : | |

BEFORE: Duffy, Chairman; Jordan, 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 April 25, 2008, the Commission received from Harvest-Time Coal, Inc. (“Harvest-Time”) a motion by counsel seeking to reopen penalty assessments that had become final orders 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 12, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 00139807 to Harvest-Time. Harvest-Time does not give a reason for failing to contest the proposed assessment but states that it sought to conference the citations at issue with MSHA and that its request was wrongly denied. Neither party mentions nor has submitted the other proposed assessment at issue, No. 000139809, and it is

¹ We note that Docket No. WEVA 2008-966 was assigned in error and that all the citations that the operator seeks to contest are contained in Docket No. WEVA 2008-965. All subsequent pleadings in this case should have only one docket number.

therefore impossible to determine why or how long Harvest-Time delayed in responding to the second assessment.

The Secretary asserts that Proposed Assessment No. 000139807 was sent by Federal Express to the address of record for Harvest-Time but was returned as undelivered. According to the Secretary, this constituted service under 30 C.F.R. § 100.8(a) (“Proposed penalty assessments delivered to [the addresses of record] shall constitute service.”). The Secretary states that although she does not oppose the reopening of the assessment, she urges Harvest-Time to take all necessary steps to ensure that it timely contests penalty assessments in the future.

We have held 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 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 Harvest-Time's motion and the Secretary's response thereto, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Harvest-Time's failure to timely contest the penalty proposal and whether relief from the final order should be granted. We also direct the judge to require Harvest-Time to explain whether and when it received the proposed penalty assessment in question, to obtain and submit any missing assessment form and all other relevant documents, to indicate which proposed penalties it seeks to contest, and to explain why it did not file its contest in a timely manner. If it is determined that relief from the final order is appropriate, the cases shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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