FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 8, 2009

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

:

v. : Docket No. WEVA 2009-1669

A.C. No. 46-09136-184534

BIG RIVER MINING, LLC

:

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 Big River Mining, LLC ("Big River") a motion 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).

Big River states that, when it received the proposed penalty assessment, its safety director, who is responsible for reviewing proposed penalties, was absent from the office for training and personal reasons. Big River further states that, after the safety director returned to the office, for some unknown reason, he never received the proposed penalty assessment. Big River states that the safety director learned of the penalties only when he received another assessment and saw the penalties listed.

The Secretary opposes reopening the proposed penalty assessment. The Secretary argues that Big River has made no showing of exceptional circumstances warranting reopening and that an operator's inadequate or unreliable internal processing procedures should not constitute an adequate justification. The Secretary also notes that Big River failed to timely contest assessments in two other dockets in which it sought to reopen final orders because proposed assessments were not in its files.

Having reviewed Big River'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 Big River's failure to timely contest the penalty and whether relief from the final order should be granted.¹ 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

¹ On remand, the judge should consider whether Big River has met the standard for relief in light of its prior failures to adequately track assessments after delivery to its office and warnings from the Secretary that she would oppose future motions to reopen if Big River did not establish adequate procedures to ensure that assessments were timely contested.

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