

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

June 1, 2009

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | Docket No. WEVA 2009-835 |
| v. | : | A.C. No. 46-09029-167319 |
| | : | |
| MINGO LOGAN COAL COMPANY | : | |

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners¹

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 February 11, 2009, the Commission received a motion by counsel to reopen a penalty assessment issued to Mingo Logan Coal Company (“Mingo Logan”) 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).

On October 29, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000167319 to Mingo Logan, proposing penalties for 60 citations that had been issued to the operator for alleged violations at its Mountaineer II mine. According to the affidavit from that mine’s safety manager included with the motion, on November 12, 2008, he had sent MSHA a contest form indicating Mingo Logan’s desire to contest 16 of the proposed penalties. Attached to the affidavit is a copy of the contest form with

¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), the Commission has delegated the power to rule on this reopening request to a three-member panel.

certain boxes checked and a handwritten note allegedly indicating when the form was mailed. The affidavit further states that on the following day Mingo Logan sent MSHA a check for the uncontested penalties. Nevertheless, on January 29, 2009, Mingo Logan received a delinquency notice from MSHA regarding the penalties on the assessment form that Mingo Logan claimed it had contested.

The Secretary states that she does not oppose the reopening of the assessment, but notes that there is no record of MSHA having received the contest form.

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 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 Mingo Logan’s motion 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

Distribution:

Donna C. Kelly, Esq.
Dinsmore & Shohl, LLP
P.O. Box 11887
900 Lee Street, Suite 600
Charleston, WV 25339

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, 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