

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 19, 2004

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

v.

PHILIP ENVIRONMENTAL  
SERVICES, INC.

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Docket No. CENT 2003-26-M  
A.C. No. 03-00257-05505 XSC

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, 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. (1994) (“Mine Act”). On October 11, 2002, the Commission received from Philip Environmental Services, Inc. (“Philip Environmental”) a motion made by counsel 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 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).

In its motion, Philip Environmental states that on September 12, 2001, it received from the Department of Labor's Mine Safety and Health Administration ("MSHA") a proposed penalty assessment in the amount of \$15,000 relating to a citation issued in April 2000. Mot. at 1-2. It further states that on October 1, 2001, it timely mailed a request for hearing on its counsel's letterhead to MSHA contesting that proposed penalty assessment. *Id.* at 1; Attach A. Philip Environmental explains that although MSHA allegedly has no record of the request for hearing, the Secretary moved to stay a companion case pending the proceeding of the subject case. Mot. at 1-3. Finally, it submits that its hearing request might have been delayed by the anthrax/mail problems that took place during the fall of 2001. *Id.* at 3. Philip Environmental attached to its motion a letter dated October 1, 2001, from the operator's counsel to MSHA contesting the penalty assessment; a Stay Order dated January 19, 2001; and a motion to stay by the Secretary of Labor dated January 17, 2001. Attachs. A, B & C. The Secretary states that she does not oppose Philip Environmental's request for relief.

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

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Michael F. Duffy, Chairman

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Robert H. Beatty, Jr., Commissioner

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Mary Lu Jordan, Commissioner

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

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