FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 23, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 2007-120-M
	:	A.C. No. 41-04614-99988
v.	:	
	:	Docket No. CENT 2007-121-M
SMITHVILLE SAND & GRAVEL	:	A.C. No. 41-04614-102470

BEFORE: Duffy, Chairman; Jordan 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. (2000) ("Mine Act").[1] On February 6, 2007, the Commission received from Smithville Sand & Gravel ("Smithville") requests from its general manager 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).

During August 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued citations and an order to Smithville. On October 5 and November 2, MSHA issued proposed assessments to which Smithville did not respond. On January 4 and February 1, 2007, MSHA's Civil Penalty Compliance Office sent Smithville delinquency notices regarding the penalties that had become final orders. In its requests, Smithville states that it is a "new company," was "ignorant of the rules," and was "misdirected." In her response, the Secretary

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2007-120-M and CENT 2007-121-M, both captioned *Smithville Sand & Gravel* and both involving similar issues. 29 C.F.R. § 2700.12.

requests that Smithville provide a detailed explanation as to why it believes that reopening is warranted and that the Secretary will respond further as to whether such relief is warranted.

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 Smithville's requests, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Smithville's failure to timely contest the penalty proposals and whether relief from the final orders should be granted. Before the judge, Smithville should provide a more detailed explanation of whether it is entitled to a reopening of the penalty assessments under the principles noted above. If it is determined that such relief is appropriate, these cases 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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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

Distribution

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