

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

November 13, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 2008-21-M
	:	A.C. No. 39-01477-106913
v.	:	
	:	
L.G. EVERIST, INC.	:	

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”). On October 10, 2007, the Commission received from L.G. Everist, Inc. (“Everist”) a letter 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 October 18, 2006, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued eight citations to Everist. Everist filed contests of six of the subject citations at issue, which are currently pending before Administrative Law Judge Richard Manning (Docket Nos. CENT 2007-054-RM, CENT 2007-055-RM, CENT 2007-056-RM, CENT 2007-057-RM, CENT 2007-058-RM, CENT 2007-059-RM). Subsequently, MSHA issued a proposed penalty assessment to Everist, covering the eight citations.<sup>1</sup> In its letter, Everist states that upon receiving the proposed assessment, it checked the six citations that it had intended to contest and remitted a check for the two citations that did not wish to contest. Everist further asserts that it mistakenly

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<sup>1</sup> Neither party has submitted the proposed penalty assessment. Consequently, we are unable to determine exactly when the penalty assessment was issued.

failed to send the proposed assessment form to MSHA with the payment. Everist additionally submits that MSHA applied the partial payment to two of the citations that it had intended to contest. In response, the Secretary states that she does not oppose reopening the proposed penalty assessments.

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 Everist’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Everist’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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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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