FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 8, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. CENT 2008-218-M
	:	A.C. No. 16-00509-130582
v.	:	
CARGILL DEICING TECHNOLOGY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners[1]

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 January 17, 2008, the Commission received a letter from Cargill Deicing Technology ("Cargill") requesting that the Commission 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).

On November 1, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Cargill a proposed assessment (A.C. No. 000130582), proposing civil penalties for ten citations. It appears that Cargill paid the proposed penalties for

[1] Commissioner Robert F. Cohen, Jr., assumed office after this case had been filed. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Cohen has elected not to participate in this matter.

nine of the citations and did not pay the proposed penalty for Citation No. 6240831. In its letter, Cargill requests a hearing on Citation No. 6240831. Cargill submits that it previously requested a conference with MSHA on the citation, but that it was subsequently informed that MSHA did not have a record of that request. Cargill states that "[d]ue to clerical error [MSHA] suggested that [it] re-fax the request . . . for a hearing [to the Commission]." The Secretary of Labor states that she does not oppose Cargill's request for relief. For convenience, the Secretary attached a copy of the proposed assessment, noting which penalties had been paid.

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).

We conclude that Cargill failed to provide a sufficiently detailed explanation for its failure to timely return the proposed assessment form contesting the proposed penalty for Citation No. 6240831. Accordingly, in the interests of justice, and in consideration of the unopposed nature of Cargill's request, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Cargill'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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