FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

November 25, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2008-591-M
v.	:	A.C. No. 03-01723-135548
	:	
PINE BLUFF SAND & GRAVEL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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 June 13, 2008, the Commission received from Pine Bluff Sand & Gravel Company ("Pine Bluff") a motion by counsel seeking 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).

On January 9, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000135548 to Pine Bluff, proposing penalties for three citations that had been issued to the company in September 2007 for violations at its River Mountain Quarry location ("River Mountain"). Pine Bluff states that prior to that, its River Mountain representative had participated with an MSHA representative in a conference that Pine Bluff had requested regarding one of those citations, No. 7851308. Pine Bluff further states that consequently it did not believe it needed to contest the assessment as to that citation until it received the results of the conference, which its original motion states it had yet to receive. Pine Bluff's motion includes evidence showing that it timely paid the penalties for the other two citations.

The Secretary opposes reopening on the ground that Pine Bluff has failed to demonstrate the exceptional circumstances necessary to support reopening. The Secretary states that the penalty assessment, MSHA's regulations, and the Commission's regulations all unequivocally provide for 30 days in which to contest a proposed penalty, and that there was nothing that would have led an experienced operator like Pine Bluff to believe that the conference that was held suspended the 30-day requirement. The Secretary also includes an affidavit from its representative stating that he left a telephone message two days after the conference was held informing Pine Bluff that there would be no changes in the citation. The Secretary also points out that MSHA notified Pine Bluff of the delinquency of the penalty payment over two months before Pine Bluff filed its motion to reopen.

Pine Bluff responded to the Secretary's opposition to reopening with affidavits of two of its River Mountain representatives. River Mountain's Human Resources Director, Lloyd Baker, states that he does not recall receiving the phone message from the MSHA representative that the citation would not be changed. In addition, both Baker and John Regenhardt, General Manager of River Mountain, state that when they received the delinquency notice in April 2008, they believed it was a result of MSHA incorrectly allocating the payment that Pine Bluff had submitted on the two penalties it had paid. The two state that it was only the following month, after they had pursued correction with MSHA, that they realized that the delinquency notice was for the penalty assessment that had never been formally contested.

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 Pine Bluff's motion, the Secretary's opposition, and Pine Bluff's response to the opposition, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Pine Bluff'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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Robert F. Cohen, Jr., Commissioner

Distribution:

Laura E. Beverage, Esq.
Jackson Kelly PLLC
1099 18th Street, Suite 2150
Denver, CO 80202

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
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3909

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