

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 1, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 2007-170
	:	A.C. No. 15-18850-100852
v.	:	
	:	
ICG HAZARD, LLC	:	

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 February 14, 2007, the Commission received from ICG Hazard, LLC (“ICG”) 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 August 10, 2006, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a citation and order to ICG. On October 21, ICG received the proposed assessment for the citation. ICG states that the employee who was responsible for returning the assessment form in order to contest the proposed assessment was discharged during that time period. Accordingly, ICG did not discover the form and return it to MSHA until January 15, 2007. ICG was then notified that its response was untimely. The Secretary states that she does not oppose ICG’s request to reopen the penalty assessment related to the citation. However, the Secretary further states that she does not agree to the reopening of the order because no penalty was issued for that order.

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 ICG’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 ICG’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 2700.¹

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

¹ Both the motion and the Secretary’s response were filed prior to the Commission’s decision in *Maple Creek Mining, Inc.*, 29 FMSHRC ___, No. PENN 2002-23-C (July 13, 2007), which addressed the issue of when certain orders can be contested in a civil penalty proceeding. It is not discernible from ICG’s Motion to Reopen and the proposed assessment (Exhibit 1) whether, if the proposed penalty for Citation No. 7516790 is reopened, ICG can contest Order No. 7516794. *Compare Maple Creek*, slip op. at 11-14. On remand, in order to contest the order as well as the citation underlying the penalty assessment, ICG must present sufficient facts to the judge to determine that the order is reviewable under the rationale of *Maple Creek*.

Distribution

Melanie J. Kilpatrick, Esq.
Rajkovich, Williams, Kilpatrick & True, PLLC
2333 Alumni Park Plaza, Suite 310
Lexington, KY 40517

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

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