

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

April 30, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2008-512
v.	:	A.C. No. 15-09830-132554
	:	
ROAD FORK DEVELOPMENT	:	
COMPANY, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners¹

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 11, 2008, the Commission received from Road Fork Development Company Inc. (“Road Fork”) 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 November 27, 2007, the Department of Labor’s Mine Safety and Health Administration issued a proposed assessment to Road Fork for 12 citations that had been

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.

previously issued to the operator. Road Fork states that, following receipt of the assessment, it faxed the proposed assessment to the law firm which represented it in proceedings before the Commission. The paralegal at the law firm who is responsible for receiving and processing documents attempted to scan the assessment form and send it by electronic mail to the attorneys who were primarily responsible for handling Road Fork matters. However, because of unspecified technical problems, the attorneys never received the email, and no contest of the penalty assessment was filed. Road Fork learned of the error when it received an invoice from MSHA specifying unpaid assessments. The Secretary states that she does not oppose the reopening of the assessment.²

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).

² This is the first of three proceedings involving the same law firm where a breakdown in office procedures has been cited as the reason for contests not being filed. Orders are also being issued today in the other two proceedings, *Clean Energy Mining Co.*, Docket No. KENT 2008-538, and *Long Fork Coal Co.*, Docket No. KENT 2008-633. In her letter in response to the motion filed in *Long Fork*, the Secretary urges that counsel take steps to ensure that such breakdowns do not continue and that penalty assessments are timely contested. We agree with this recommendation.

Having reviewed Road Fork'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 Road Fork'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.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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