# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 26, 2007

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | Docket No. LAKE 2007-161-M |
| | : | A.C. No. 33-02518-103814 P100 |
| v. | : | |
| SHERMAN EQUIPMENT COMPANY, 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 August 8, 2007, the Commission received a letter from Sherman Equipment Company, Inc. ("Sherman") 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 May 24, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 6167377 to Sherman. In its letter, the operator states that it believed that "this matter was closed a year ago," and that, until it received a collection letter, it had "no idea" that there was an outstanding penalty. In response, the Secretary requests that the Commission direct the operator to provide an adequate explanation of why it did not contest the proposed assessment in a timely manner, particularly why it had "no idea" that it had an outstanding penalty. The Secretary explains that a proposed penalty assessment was sent to the operator's correct address on November 21, 2006, but that the proposed assessment was later returned "unclaimed." The Secretary further states that in April 2007, MSHA sent a notification to the operator's correct address that the proposed penalty had become delinquent.

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 Sherman's letter, we agree with the Secretary that Sherman must provide an explanation as to why reopening this matter is warranted. Accordingly, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Sherman'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

Distribution

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