

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 7, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2008-307
v.	:	A.C. No. 12-02249-133229
	:	
FIVE STAR MINING, INC.	:	

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 April 4, 2008, the Commission received from Five Star Mining, Inc. (“Five Star”) a motion made by counsel 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 December 5, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000133229 to Five Star, proposing penalties for multiple citations and orders that had been issued to the company. According to Five Star, it contested the corresponding order to the proposed penalty it now seeks to reopen in a notice of contest submitted on June 28, 2007, and docketed as No. LAKE 2007-144-R. Five Star asserts that counsel for the company promptly returned the proposed assessment form indicating that it wished to contest the proposed assessment for the previously contested order. However, Five Star contends that the contest was mistakenly sent to the Commission’s Docket Office in Washington, D.C., instead of MSHA’s Civil Penalty Compliance Office in Arlington, Virginia. Five Star asserts that it was informed of its error by an attorney in the Secretary’s Regional

Solicitor's Office, who instructed the company's counsel to submit the proposed assessment contest with a cover letter to the Civil Penalty Compliance Office. Five Star explains that it inquired with the Civil Penalty Compliance Office when it did not hear back from MSHA and was told to file a request to reopen with the Commission. The Secretary states that she does not oppose Five Star's request to reopen the proposed penalty assessment.

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 Five Star's motion and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Five Star'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

Robert F. Cohen, Jr., Commissioner

Distribution:

Scott D. Matthews, Esq.
Ice Miller, LLP
One American Square
Suite 3100
Indianapolis, IN 46282-0200

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

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Fl.
Arlington, VA 22209-3939

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