

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 6, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2008-447
v.	:	A.C. No. 12-02249-129078
	:	
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 May 30, 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 October 15, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000129078 to Five Star, proposing penalties for a citation and two orders that had been issued to the company in February and March of 2007. Five Star states that its counsel received the proposed penalty assessment from it on November 14, 2007, and that an e-mail in counsel’s file indicates that he initially believed that Five Star had already contested Citation No. 6668861 and that the proposed assessment had not been issued until November 13, 2007. Five Star further states that its counsel thereafter filed a notice of contest regarding the proposed assessment for that citation on November 27, 2007, which was untimely.

The Secretary initially responded to the motion by noting that it merely states that a mistake was made, without explaining why the mistake was made or why it should be excused. The Secretary also pointed out that the operator had failed to address why it did not file its motion until four and one-half months after MSHA had notified it in January 2008 that it was delinquent in paying the assessment for the citation and two orders. The Secretary requested that we not rule on the motion until Five Star had the opportunity to supply the missing information.

Five Star thereafter filed a reply in which it explains that the late filing was due to counsel misreading the assessment he had received from the operator and consequently erroneously calculating the deadline for contest. Further, Five Star explains that the delinquency letter from MSHA went to its accounting department, and not to either the mine safety manager or counsel, who each believed that the citation in question had been contested. According to Five Star, it was not until late April 2008, when the Treasury Department contacted its accounting department regarding the unpaid assessment, that counsel was alerted to the fact that the contest he filed might not have been timely. The Secretary thereafter filed a letter stating that, in light of Five Star's reply, she does not oppose the motion to reopen.

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 reply and the Secretary's responses, 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.<sup>1</sup> 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

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<sup>1</sup> Five Star appears to be suggesting that the January 2008 MSHA notice to its accounting department was insufficient to put the company on notice that MSHA was not treating its contest as effective. However, the receipt of the MSHA delinquency notice by the accounting department should have triggered a response by the company, but that appears not to be the case. Moreover, that delinquency notice was for all three penalties, including the two penalties that Five Star does not seek to contest. Five Star does not explain in either its original motion or its reply why it did not pay any of the penalties until Treasury Department action may have forced the issue.

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