FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 8, 2004

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2003-187
v.	:	A.C. No. 36-08071-03528
	:	
ENERCORP INCORPORATED	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, 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. (1994) ("Mine Act"). On August 22, 2003, the Commission received from EnerCorp Incorporated ("EnerCorp") correspondence which we construe as a request 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 23, 2002, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment (A.C. No. 36-08071-03528) to EnerCorp's mine in Morrisdale, Pennsylvania. In its request, EnerCorp states that its president had discussed the proposed penalties with an individual with MSHA; that, based on this conversation, the company believed that MSHA would "throw out" most, if not all, of the penalties; and that the company had been waiting for further information from MSHA. Mot. EnerCorp did not attach any supporting documentation to its request. The Secretary states that, in her opinion, EnerCorp's request does not establish that the proposed penalty assessment should be reopened but that she does not oppose EnerCorp's filing of a supplemental motion further addressing the

question of whether it can satisfy the requirements for reopening the assessment and obtaining relief from the final section 105(a) 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 EnerCorp's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for EnerCorp'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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Robert H. Beatty, Jr., Commissioner

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Mary Lu Jordan, Commissioner

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

Distribution

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