

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 23, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2004-16
v.	:	A.C. No. 36-05466-04193
	:	
RAG EMERALD RESOURCES, LP	:	

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 November 6, 2003, the Commission received from RAG Emerald Resources, LP (“RAG Emerald”) 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).

We have held, however, 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).

On February 14, 2003, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 7084326 to RAG Emerald. In its motion, RAG Emerald states that on June 11, 2003, MSHA issued a proposed civil penalty assessment (A.C. No. 36-05466-04193) covering several citations including Citation No. 7084326. Mot. at 1-2. RAG Emerald further states that on July 3, 2003, RAG Emerald paid the penalties for all the citations except Citation No. 7084326. *Id.* at 2. It also states that it timely filed a "green card" contesting the proposed penalty for Citation No. 7084326. *Id.* Finally, RAG Emerald states that MSHA's Office of Assessments has informed it that RAG Emerald is delinquent with regard to the penalty proposed for Citation No. 7084326 and that MSHA has no record of a "green card" having been received for that penalty proposal. *Id.* RAG Emerald attached the following documentation to its motion: Citation No. 7084326; the proposed civil penalty assessment; the computer record of operator's payment; and an affidavit of its Safety Manager. The Secretary states that she does not oppose RAG Emerald's request for relief.

Having reviewed RAG Emerald'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 RAG Emerald's alleged 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

Robert H. Beatty, Jr., Commissioner

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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