

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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April 4, 2008

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | Docket No. PENN 2008-132 |
| ADMINISTRATION (MSHA) | : | A.C. No. 36-08299-130703 |
| | : | |
| v. | : | Docket No. PENN 2008-142 |
| | : | A.C. No. 36-08299-123747 |
| LITTLE BUCK COAL COMPANY | : | |

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 December 28, 2007, the Commission received from Little Buck Coal Company (“Little Buck”) a motion made by counsel to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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 23, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued six citations and orders to Little Buck. The operator subsequently filed timely contests of each citation and order, and those contests are pending in Docket Nos. PENN 2007-267-R through PENN 2007-272-R. MSHA later issued Proposed Assessment No. 000123747, which proposed a penalty for one of the citations, and Proposed Assessment No. 000130703, which proposed penalties for the other five citations and orders.

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers PENN 2008-132 and PENN 2008-142, both captioned *Little Buck Coal Co.*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

Little Buck states that it believed it had forwarded the proposed assessments to the outside counsel representing it in the related contest proceedings. When that counsel learned from opposing counsel in the contest proceedings that neither of the proposed assessments had been contested within the applicable 30-day periods, she alerted Little Buck of its failure to forward the assessments. The Secretary states that she does not oppose Little Buck's request to reopen the proposed penalty assessments.

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 Little Buck'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 Little Buck's failure to timely contest the penalty proposals and whether relief from the final orders 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

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