

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

May 19, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. PENN 2008-190-M
	:	A.C. No. 36-08895-129558
v.	:	
	:	
H.B. MELLOTT ESTATE, 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 February 8, 2008, the Commission received from H.B. Mellott Estate, Inc. (“Mellott”) a letter seeking to reopen a penalty assessment that may have 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 18, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000129558 to Mellott, proposing penalties for seven citations that had been issued to the operator earlier in the year. The company states that it paid three of the penalties, and submits a copy of its canceled check to MSHA as proof. As for the other four penalties, Mellott contends that it indicated on the assessment form that it was contesting those penalties and includes a copy of the form showing as much. The operator states that it does “not know why the Review Commission did not receive the hearing request.”

In response, the Secretary states that she does not oppose reopening the proposed assessment as to the four penalties. She points out, however, that it is not clear from Mellott’s

request to reopen where it sent the penalty contest. She restates from the assessment form the different MSHA addresses to which contests and payments are to be sent.

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 Mellott’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Mellott timely contested the penalty proposal and, if not, whether good cause exists for granting relief from the final order. 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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