FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 16, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2008-367
v.	:	A.C. No. 36-06586-142894
WAROQUIER COAL COMPANY	:	

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 8, 2008, the Commission received from DMS Safety Services ("DMS") a letter seeking to reopen a penalty assessment issued to Waroquier Coal Company ("Waroquier") 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 March 5, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Waroquier Proposed Assessment No. 000142894, which proposed civil penalties for several citations. DMS states that the company received the proposed assessment on March 11, 2008. DMS alleges that the receptionist, who signed for receipt of the proposed assessment, was unaware of the 30-day deadline and did not pass the form to the safety director until April 7, 2008. DMS submits that the safety director did not know about the delay and mailed the contest of the proposed assessment on April 17. The Secretary states that she does not oppose this request to reopen the proposed assessment. However, she urges the operator to take all steps necessary to ensure that, in the future, any penalty assessments are contested in a timely manner.

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 this request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Waroquier's failure to timely contest the penalty proposal and whether relief from the final order should be granted. On remand, the judge should determine whether DMS has the legal authority to file this request on behalf of Waroquier. He should also evaluate the reason why the safety director believed that the proposed assessment dated March 5, 2008 had not been received until the beginning of April. 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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