

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

July 1, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. PENN 2008-376
	:	A.C. No. 36-09159-119300
v.	:	
	:	
T.J.S. MINING, 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 May 16, 2008, the Commission received from T.J.S. Mining, Inc. (“T.J.S. Mining”) 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 May 31, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000119300 to T.J.S. Mining, which proposed civil penalties for five citations, including Citation No. 7063809. T.J.S. Mining states that it paid the penalties for four of the citations and contested the proposed penalty for Citation No. 7063809. However, the operator subsequently received a letter from MSHA stating that T.J.S. Mining had failed to timely contest Proposed Assessment No. 000119300. In its letter, which was dated March 21, 2008, MSHA states that the hearing request was faxed to it on March 17, 2008.

The Secretary states that she does not oppose T.J.S. Mining’s request to reopen. She notes, however, that while MSHA records show a payment received on July 9, 2007, there is no

record that MSHA's Civil Penalty Compliance Office in Arlington, Virginia, received a contest of the proposed penalty for Citation No. 7063809.¹

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).

¹ By the terms of the proposed assessment, payment of a proposed penalty must be sent to MSHA at a Pittsburgh, Pennsylvania, address, while the form contesting a proposed penalty must be sent to MSHA at an Arlington, Virginia, address.

Having reviewed T.J.S. Mining's 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 T.J.S. Mining timely contested the penalty proposal and, if not, whether good cause exists for granting relief from the final order. If it is found that T.J.S. Mining did, in fact, contest the penalty proposed, the date of the contest should be ascertained. If it is determined that relief from the final order 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

Robert F. Cohen, Jr., Commissioner

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