

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 29, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2003-112-M
v.	:	A.C. No. 55-00013-05508
	:	
VIRGIN ISLANDS QUARRY, INC	:	

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 May 14, 2003, the Commission received from Virgin Islands Quarry a request 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).

In its request, Virgin Islands Quarry states that it made a decision to contest the penalty and mailed the necessary documents. Mot. It further states that it appeared as if the designated office did not receive the documents. *Id.* It also asserts that it received a final order letter from the Civil Penalty Compliance Office dated April 9, 2003. *Id.*

In her Response to Request to Reopen Assessment (“Response”), filed May 28, 2003, the Secretary presents a fairly detailed summary (with attachments) of the correspondence between the operator and the Mine Safety and Health Administration’s Civil Penalty Compliance Office. Response at 1. The Secretary further states that because Virgin Islands Quarry has identified no grounds for reopening the penalty assessment, she requires additional information before she can express her position on the operator’s motion. Response at 2-3.

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 Virgin Island Quarry's motion, in the interests of justice, we remand this matter, including the Secretary's response, to the Chief Administrative Law Judge for a determination of whether good cause exists for Virgin Island Quarry's 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

Distribution

Raymond J. Williams  
OH&S Manager  
Virgin Islands Quarry, Inc.  
P.O. Box 641 Kingshill  
St. Croix, VI 00851

W. Christian Shumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
1100 Wilson Blvd., 22<sup>nd</sup> Floor West  
Arlington, VA 22209-2247

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001-2021