

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 25, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2003-78-M
v.	:	A.C. No. 01-00678-05552
	:	
COSBY-CARMICHAEL, 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 February 26, 2003, the Commission received from Cosby-Carmichael, Inc. (“Cosby-Carmichael”) a motion 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).

On October 25, 2002, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment (A.C. No. 01-00678-05552) to Cosby-Carmichael’s Cosby #1 Pit in Dallas County, Alabama. In its motion, Cosby-Carmichael states that it never received MSHA’s proposed assessment and learned of the assessment when it received a notice of delinquent penalty from MSHA’s Civil Penalty Compliance Office dated February 12, 2003. Mot. Cosby-Carmichael also states that it telephoned MSHA and spoke with an MSHA employee, who informed it that the proposed assessment was sent certified mail on October 26, 2002 and was returned to MSHA unclaimed on November 9, 2002. *Id.* The MSHA employee also faxed to Cosby-Carmichael a copy of the proposed assessment. *Id.* Cosby-

Carmichael further states that “Mr. Carmichael picks up [the operator’s] mail Monday through Friday” from the Selma, Alabama U.S. Post Office, and does not recall receiving any notices. *Id.* Cosby-Carmichael attached to its motion a copy of MSHA’s notice of delinquent penalty and proposed assessment. The Secretary states that she does not oppose Cosby-Carmichael’s request for relief.

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 Cosby-Carmichael'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 Cosby-Carmichael'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

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