

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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May 11, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2004-108-M
v.	:	A.C. No. 38-00007-17075
	:	
GIANT CEMENT COMPANY	:	

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 March 24, 2004, the Commission received from Giant Cement Company (“Giant Cement”) a motion filed by counsel 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 motion, Giant Cement states that on or about November 14, 2003, it was issued a pair of citations (Citation Nos. 6111285 and 6111286). Mot. at 1; Declaration of Lloyd C. (“Buddy”) Hartzog, Jr. (“Declaration”) at 1. Giant Cement also states that it timely contested the citations on November 17, 2003, and that the contest proceedings were assigned to an administrative law judge. Mot. at 1; Dec. at 1. Giant Cement further states that on or about January 8, 2004, while the contest proceedings were pending, the Secretary proposed a penalty for Citation No. 611286. Mot. at 2; Dec. at 2. The operator asserts that, mistakenly believing that the pendency of the contest proceedings obviated the need to respond to the proposed penalty, and without consulting counsel, it failed to challenge the proposed penalty assessment.

Mot. at 2; Dec. at 2.<sup>1</sup> Giant Cement contends that on or about March 11, 2004, counsel for the Secretary advised Giant Cement's attorneys that the Secretary had agreed to vacate Citation No. 6111286. Mot. at 2; Dec. at 2. It further contends that even before it learned that the Secretary would vacate the citation, it intended to contest the penalty and ask the judge to consolidate the penalty proceeding with the contest proceedings. Dec. at 2. The Secretary states that she does not oppose Giant Cement'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).

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<sup>1</sup> Giant Cement states that it realized its mistake before it received the penalty proposal for Citation No. 6111285, and that shortly after it arrived, on or about March 2, 2004, it advised MSHA of its intent to contest it. Dec. at 2.

Having reviewed Giant Cement'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 Giant Cement'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.

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Michael F. Duffy, Chairman

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Robert H. Beatty, Jr., Commissioner

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Mary Lu Jordan, Commissioner

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

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