## FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW SUITE 9500 WASHINGTON, DC 20001

	July 11, 2006	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
V.	:	Docket No. SE 2006-173-M
	:	A.C. No. 01-00043-49139 A
GARY STRUNK,	:	
employed by LEHIGH CEMENT	:	
COMPANY	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

## <u>ORDER</u>

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 April 26, 2006, the Commission received a motion made by counsel on behalf of Gary Strunk, an employee of Lehigh Cement Company, to reopen a penalty assessment against Strunk that he believed may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary responded to Strunk's motion in a letter dated May 2, 2006.

Under the Commission's Procedural Rules, an individual charged under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to so notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

In his motion to reopen, Strunk states that on February 11, 2005, he received a proposed penalty assessment from the Department of Labor's Mine Safety and Health Administration ("MSHA"). Mot. at 3; Strunk Aff. at 2. Strunk further states that when he attempted to schedule a "pre-contest meeting" with MSHA through his legal counsel, MSHA responded that the proposed assessment had already been contested. *Id.* Strunk's counsel nevertheless filed a timely contest of the proposed assessment. Mot. at 3; Ex. 5. However, Strunk states that on

March 20, 2006, he received a notice from MSHA stating that the penalty against him was delinquent. Mot. at 2.

In her response to Strunk's motion, the Secretary states that Rule 60(b) of the Federal Rules of Civil Procedure (from which the Commission has found guidance in evaluating requests to reopen final orders) "is inapplicable," and Strunk's motion would not be time barred, because "the proposed penalty assessment[ was] effectively contested in a timely manner." Sec'y Response at 1.

Having reviewed Strunk's motion and the Secretary's response, we conclude that the proposed assessment at issue has not become a final order of the Commission because Strunk timely contested it. We deny Strunk's motion as moot and remand this matter to the Chief Administrative Law Judge for further proceedings as appropriate 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

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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