

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

February 11, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE-2009-20
ADMINISTRATION (MSHA)	:	A.C. No. 01-00329-155698
	:	
v.	:	Docket No. SE-2009-21
	:	A.C. No. 01-00851-155699
OAK GROVE RESOURCES, LLC	:	

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. (2006) (“Mine Act”). On October 9, 2008, the Commission received from Oak Grove Resources, LLC, (“Oak Grove”) a request to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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).

The Secretary states that she does not oppose the reopening of the proposed penalty assessments.²

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers SE 2009-20 and SE 2009-21, each captioned *Oak Grove Resources, LLC*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

² The record indicates that, because of internal delays, Oak Grove filed its contests one day late, and promptly filed a motion to reopen upon discovering that the contests were untimely.

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 mistake, inadvertence, or excusable neglect. *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 Oak Grove’s request and the Secretary’s response, in the interests of justice we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file petitions for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution:

Justin A. Rubenstein, Esq.
Dinsmore & Shohl, LLP
215 Don Knotts Blvd.
Suite 310
Morgantown, WV 26501

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
U.S. Dept. Of Labor
Office of Civil Penalty Compliance
MSHA
1100 Wilson Blvd., 25th Fl.
Arlington, VA 22209

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