

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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April 5, 2004

SECRETARY OF LABOR,	:	Docket No. WEST 2003-124-M
MINE SAFETY AND HEALTH	:	A.C. No. 02-02638-05509
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2003-125-M
v.	:	A.C. No. 02-02638-05510
	:	
	:	Docket No. WEST 2003-126-M
DOUBLE J SAND & ROCK	:	A.C. No. 02-02638-05511

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”).¹ On December 23, 2002, the Commission received from Double J Sand & Rock (“Double J”) correspondence which we construe as a motion to reopen three 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).

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 December 14, 2001, and August 9, 2002, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued three proposed penalty assessments (A.C. Nos. 02-02638-05509, 02-02638-05510, and 02-02638-05511) to Double J in La Paz County,

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2003-124-M, WEST 2003-125-M, and WEST 2003-126-M, all captioned *Double J Sand & Rock* and all involving issues similar to those addressed in this order. 29 C.F.R. § 2700.12.

Arizona. In its motion, Double J contests the merits of the underlying violations and complains about the MSHA inspector's behavior. Mot. Double J attached to its request a copy of a letter, dated September 7, 2001, that it sent to MSHA challenging the citations. The Secretary states that she does not oppose Double J'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).

Double J has provided no explanation for its failure to timely contest the proposed assessments. On the basis of the present record, we are thus unable to evaluate the merits of Double J's position. We hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Double J'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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