

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

March 23, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2003-260-M
v.	:	A.C. No. 04-04075-05607
	:	
HANSON PERMANENTE CEMENT, 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 April 25, 2003, the Commission received from Hanson Permanente Cement, Inc., (“Hanson”) a motion made 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).

We have held, however, 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).

The Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment (A.C. No. 04-04075-05607) to Hanson's Permanente Plant. In its motion, Hanson states that on February 7, 2003, it timely contested MSHA's proposed civil penalty assessment by faxing a copy of a contest letter to MSHA's Office of Assessments and by also sending the letter by certified mail. Mot. at 2; Affidavit of Yvonne J. Kohlmeier (Attach. to Mot.) at 1 ("Kohlmeier Aff."). Hanson further states that its counsel received confirmation that MSHA had received the contest letter. Mot. at 2. Hanson also states that, by a letter dated April 2, 2003, MSHA informed Hanson that it was delinquent with regard to the proposed civil penalty assessment in this case. *Id.* Finally, Hanson states that, on April 21, 2003, MSHA's Office of Assessments informed counsel's legal secretary that it had no record of the contest letter filed by Hanson. Kohlmeier Aff. at 2. Hanson attached the following documentation to its motion: notices of contest of a citation and order; the letter contesting the civil penalty assessment; the confirmation of a facsimile sent to MSHA; and an affidavit of counsel's legal secretary. The Secretary states that she does not oppose Hanson's request for relief.

Having reviewed Hanson'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 Hanson's alleged 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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