

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 18, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2003-279-M
v.	:	A.C. No. 02-02873-05511
	:	
FRONTIER-KEMPER CONSTRUCTORS	:	
INCORPORATED	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners¹

ORDER

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

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On May 12, 2003, the Commission received from Frontier-Kemper Constructors Incorporated (“Frontier-Kemper”) a motion made by counsel to reopen 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).

Although Frontier-Kemper contested Citation No. 6273830,² when the penalty was

¹ Commissioner Beatty recused himself in this matter and took no part in its consideration.

² Frontier-Kemper’s motion covered the penalties assessed for Citation No. 6273830 and Citation/Order No. 6292198, each of which is the subject of a contest proceeding, docketed at WEST 2003-98-RM and WEST 2003-541-RM, respectively. On July 28, 2003, Frontier-Kemper moved for leave to amend its original motion in order to strike its request for relief with respect to the penalty assessed for Citation/Order No. 6292198, on the ground that Frontier-Kemper had entered into an agreement with the Secretary of Labor whereby a number of citations and orders would be settled. Mot. to Amend at 2. Because the settlement agreement provides that Frontier-Kemper shall pay Citation/Order No. 6292198 as written and assessed, Frontier-Kemper is

subsequently assessed for that citation in December 2002 (A.C. No. 02-02873-05511), Frontier-Kemper paid the \$399 proposed penalty the following month. Mot. to Reopen, Declaration of Robert A. Pond at ¶¶ 5, 12-13. In its motion to reopen, Frontier-Kemper asserts that payment was made inadvertently by an employee who was acting in the normal course of his or her duties but not involved in the Frontier-Kemper project that resulted in the citation, and who thus was not aware that Frontier-Kemper intended to continue to contest that citation. *Id.* at ¶¶ 11-12. Frontier-Kemper requests reopening in order to settle the assessment according to the terms of the agreement it reached with the Secretary covering Citation No. 6273830 and other citations. Mot. to Amend at 2. In a letter filed in response to Frontier-Kemper's motion to reopen but prior to its motion for leave to amend, the Secretary stated that she does not oppose the motion to reopen.

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.

Having reviewed Frontier's submissions, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Frontier-Kemper's failure to timely contest the penalty proposal for Citation No. 6273830 and whether relief from the final order should be granted. If it is determined that such relief is

withdrawing its request to reopen the penalty assessed for that citation. *Id.* We grant Frontier-Kemper's motion for leave to amend, and will consider only the penalty assessed for Citation No. 6273830 as the subject of Frontier-Kemper's motion to reopen.

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

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Distribution

Mark Savit, Esq.
Hugh C. Thatcher, Esq.
Patton Boggs, LLP
1660 Lincoln St., Suite 1900
Denver, CO 80264

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

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