FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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March 19, 2004

SECRETARY OF LABOR,	:		
MINE SAFETY AND HEALTH	:	Docket Nos.	WEST 2003-384-M
ADMINISTRATION (MSHA)	:		A.C. No. 04-05330-05508
	:		WEST 2003-385-M
v.	:		A.C. No. 04-05330-05509
	:		WEST 2003-386-M
BROWN SAND, INC.	:		A.C. No. 04-05330-05510
	:		

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 9, 2003, the Commission received from Brown Sand, Inc. ("Brown") a motion made by counsel 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).[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).

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

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2003-384-M through WEST 2003-386-M, all captioned *Brown Sand, Inc.* and all involving issues similar to those addressed in this order. 29 C.F.R. § 2700.12

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).

In its motion, Brown states that in late August 2002, it filed notices of contest in response to 29 citations the Department of Labor's Mine Safety and Health Administration ("MSHA") had issued to it earlier that month (Citation Nos. 6337115 through 6337143, docketed at WEST 2002-496-RM through WEST 2002-524-RM). Mot. at 2. Each of the notices stated that Brown was contesting, among other things, "any penalties assessed herein." *Id*. Because it included this language in its contests, Brown believed it did not have to respond to three subsequent penalty assessments (A.C Nos. 04-05330-05508 through 04-05330-05510) issued to it by MSHA in February and March 2003, which covered 27 of the 29 citations. Mot., Decl. of David Donnell at 4. Brown asserts it was always its intent to contest the penalty assessments related to the citations. *Id*. The Secretary states that she does not oppose Brown's request for relief.

Having reviewed Brown'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 Brown's failure to timely contest the penalty proposals and whether relief from the final orders 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.

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Michael F. Duffy, Chairman

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Robert H. Beatty, Jr., Commissioner

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Mary Lu Jordan, Commissioner

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

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