

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

August 30, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2004-359-M
v.	:	A.C. No. 10-01911-20099
	:	
HIGHLAND ENTERPRISES, 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. (2000) (“Mine Act”). On June 10, 2004, the Commission received from Highland Enterprises, Inc. (“Highland”) a motion filed by counsel to reopen a penalty assessment that became 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).

In its brief in support of its motion, Highland states that on January 15, 2004, Administrative Law Judge Jerold Feldman stayed a consolidated penalty proceeding pursuant to the Secretary’s motion “so that a civil penalty case and a related 110(c) personal liability case [could] be further consolidated so that all matters could be heard at once.” Br. at 2-3 (quoting Unpublished Order dated Jan. 15, 2004). Highland further states that on or about March 9 and 11, 2004, it received two proposed penalty assessments relating to the same crusher which is the subject of the stayed proceeding. *Id.* at 3; Declaration of Andy Hairston (“Hairston Declar.”) at 2. The operator asserts that after it received the proposed assessments, its agent, Andy Hairston, contacted its counsel, who instructed Hairston to complete the contest form and mail it to the

Civil Penalty Compliance Office of the Department of Labor's Mine Safety and Health Administration ("MSHA"). Br. at 3; Affidavit of Jonathan D. Hally ("Hally Aff.") at 2; Hairston Declar. at 2. Highland contends that on March 16, 2004, Hairston timely mailed the notice of contest. Br. at 3; Hairston Declar. at 2. The operator explains that on or about June 4, 2004, after contacting the Secretary's counsel, the operator's counsel subsequently determined that MSHA did not receive the notice of contest for A.C. No. 10-01911-20099, but did receive the notice of contest for the other proposed assessment, which was mailed at the same time and is now a part of Docket No. WEST 2004-238-M, also pending before Judge Feldman. Br. at 4; Hally Aff. at 2. Highland argues that the notice of contest either got lost in the mail or was misfiled or misplaced by MSHA. Br. at 4. It requests that the Commission grant its request to accept its notice of contest as timely filed. *Id.* at 2, 7; Mot. at 1. The Secretary states that she does not oppose Highland'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).

Having reviewed Highland'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 Highland'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

Distribution

Jonathan D. Hally, Esq.
Clark & Feeney
1229 Main St.
P.O. Drawer 285
Lewiston, ID 83501

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