

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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October 29, 2004

SECRETARY OF LABOR,	:	Docket No. WEST 2004-502-M
MINE SAFETY AND HEALTH	:	A.C. No. 35-03117-18572
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2004-503-M
	:	A.C. No. 35-03117-23217
	:	
v.	:	Docket No. WEST 2004-504-M
	:	A.C. No. 35-03117-12325
	:	
LAMMI SAND & ROCK	:	Docket No. WEST 2004-505-M
	:	A.C. No. 35-03117-28447

BEFORE: Duffy, Chairman; 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”).¹ On September 27, 2004, the Commission received from Lammi Sand & Rock (“Lammi”) a motion to set aside defaults in four 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).

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2004-502-M, WEST 2004-503-M, WEST 2004-504-M, and WEST 2004-505-M, all captioned *Lammi Sand and Rock* and all involving similar procedural issues. 29 C.F.R. § 2700.12.

The Department of Labor's Mine Safety and Health Administration issued the four proposed assessments to Lammi between November 4, 2003, and June 8, 2004. In its motion, Lammi states that the four assessments are related to two earlier assessments which Lammi did properly contest, Docket Nos. WEST 2004-206-M (A.C. No. 35-03317-16754) and WEST 2004-319-M (A.C. No. 35-03317-25938). Mot., Aff. at 1. The six assessments are for 51 citations that were issued as a result of the same inspection. Lammi seeks reopening of the four uncontested penalty assessments because it inadvertently failed to contest the proposed penalties, and to have the six assessments decided together. Mot., Aff. at 1-2. The Secretary of Labor has filed a response, stating that she does not oppose the request to reopen the four assessments. Sec'y Resp.

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).

On the basis of the present record, we are unable to evaluate the merits of Lammi's position. We hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Lammi's failure to timely contest the four penalty assessments 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.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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