

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 18, 2005

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. WEST 2005-245-M
v. : A.C. No. 05-04428-42795
 :
SUBURBAN SAND & GRAVEL :

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”). On March 25, 2005, the Commission received from Suburban Sand & Gravel (“Suburban”) 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).

In its motion, Suburban states that on July 15, 2004, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued the company several citations, including Citation No. 6311776. Mot. at 2. Through counsel, Suburban timely contested Citation No. 6311776, *id.*, docketed as WEST 2004-461-RM and currently on stay before Commission Administrative Law Judge Richard Manning. Counsel for Suburban explicitly requested that any proposed penalty assessments made in connection with Citation No. 6311776 be served on counsel. Mot. at 2-3. On November 12, 2004, when MSHA issued a proposed penalty assessment for Citation No. 6311776, it was sent to Suburban’s business address rather than the operator’s counsel of record in WEST 2004-461-RM. Mot. at 3. Suburban’s counsel did not receive information regarding the proposed assessment until after the time to contest it had run. *Id.* at 3-4. While the Secretary states that she does not oppose Suburban’s request for relief, she

also maintains that service of the November 12, 2004 proposed penalty assessment was properly made on the operator at its address of record.

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 Suburban’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 Suburban’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

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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