

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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March 1, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2005-61-M
v.	:	A.C. No. 02-01691-27590A
	:	
JAMES L. FANN,	:	
employed by QMAX COMPANY	:	

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 November 1, 2004, the Commission received from James L. Fann a letter requesting that the Commission reopen a penalty assessment for a violation of section 110(c) of the Mine Act, 30 U.S.C. § 820(c), 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 and the Commission’s Procedural Rules, an individual charged with a violation under section 110(c) has 30 days following receipt of the Secretary of Labor’s proposed penalty assessment within which to notify the Secretary that he or she wishes to contest the proposed penalty. 30 U.S.C. § 815(a); 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a); 29 C.F.R. § 2700.27.

On May 25, 2004, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment (A.C. No. 02-01691-27590A) to Fann. In his request, Fann states that on February 4, 2004, Docket Nos. WEST 2003-451-M, WEST 2004-76-M, WEST 2004-103-M, and WEST 2004-196-M (which pertain to his employer, Qmax Company), were stayed before Judge Zielinski awaiting Fann’s contest in this related section 110(c) case. Letter at 1. Fann asserts that, early in the process, he notified MSHA that he would

be contesting all citations. *Id.* Fann states that on July 7 and 14, 2004, he sent his intent to contest to MSHA by fax machine. *Id.* at 1-2. Fann states that, in September, he was surprised to receive a letter from MSHA notifying him that he had failed to timely contest the penalty proposal. *Id.* at 2. According to Fann, on September 23, 2004, he wrote to MSHA and on October 12, 2004, he contacted MSHA by telephone and he was informed the case would be re-opened. *Id.* Fann states that, on October 14, 2004, Judge Zielinski directed him to contact the Commission about re-opening the case. *Id.* A copy of the proposed assessment and related correspondence is attached to Fann's request to reopen. Fann did not provide any other supporting documentation. The Secretary states that she does not oppose Fann'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 Fann's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Fann'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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