

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 20, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2006-592-M
v.	:	A.C. No. 48-00639-89435
	:	
FMC CORPORATION	:	

BEFORE: Duffy, Chairman; Jordan 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 September 25, 2006, the Commission received from FMC Corporation (“FMC”) a motion 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 March 2006, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued several citations to FMC. MSHA subsequently assessed penalties against FMC for these citations in proposed assessment A.C. No. 000089435. FMC states that the proposed penalty assessment was dated May 30, 2006, but not received by it until the week of July 24, 2006. Neither FMC nor the Secretary has submitted the penalty assessment at issue or any documentation concerning its receipt by FMC or the date when FMC contested the proposed assessment. The Commission thus has no basis for determining whether FMC contested the proposed assessment in a timely manner. In addition, FMC asserts that it requested an informal conference with MSHA regarding the citations at issue. According to FMC, MSHA advised it

after the conference in June 2006 that it need take no action until the conference process was completed, and, as of the date of the motion, FMC had not been informed of the conference results. FMC claims that it delayed filing the penalty contest because it was still involved in the conference process. The Secretary states that she does not oppose FMC's request to reopen the penalty assessment.

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 FMC'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 FMC'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

Michael G. Young, Commissioner

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