FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 13, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2007-460
v.	:	A.C. No. 46-08436-100698
	:	
PERFORMANCE COAL COMPANY	:	

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 May 21, 2007, the Commission received from Performance Coal Company ("Performance") 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).

On July 3, 2006, Performance filed timely Notices of Contest in response to two orders issued by the Department of Labor's Mine Safety and Health Administration ("MSHA"). On October 27, 2006, Performance received MSHA assessment No. 000100698, by which penalties were proposed for the two orders. Performance did not contest the assessment within 30 days. By a letter dated January 16, 2007, MSHA notified Performance of its delinquency in paying the assessment. Performance states that it did not send its request for a hearing on the assessment until January 22, 2007. On March 19, 2007, the Commission Judge who had been assigned the two contest cases dismissed those cases because of Performance's failure to timely contest the penalty assessment.

According to Performance, internal delays in the distribution of mail and the attendance of company officials at meetings out of their offices prevented Performance from requesting a hearing in a timely manner. The Secretary of Labor, in her response to the motion to reopen, requests that Performance explain in detail why it took almost three months for the operator to contest the proposed penalty assessments.

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) 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 Performance's request and the Secretary's response thereto, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Performance's failure to timely contest the penalty proposals and whether relief from the final order should be granted. The issues raised by the Secretary involve fact-finding that is the province of an administrative law judge in the first instance. Consequently, the judge to whom this case is assigned should consider the Secretary's response and any reply by Performance. If the judge eventually determines that reopening is warranted, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

Distribution

Carol Ann Marunich, Esq.
Dinsmore & Shohl, LLP
215 Don Knotts Blvd., Suite 310
Morgantown, WV 26501

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Civil Penalty Processing Office
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209

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