

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 13, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2007-470
v.	:	A.C. No. 46-08436-93158
	:	
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 24, 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 citations issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). On July 11, 2006, MSHA sent Performance penalty assessment No. 000093158, by which penalties were proposed for nine citations, including the two citations Performance had contested. According to Performance, internal delays prevented the assessment form from being immediately returned to MSHA. In addition, Performance alleges that it intended to challenge proposed penalties for three of the citations. However, the assessment form received by MSHA apparently indicates that Performance challenged only one of the three penalties and that it neglected to challenge the penalties for the two citations that were the subject of contest proceedings.

The two penalties subsequently were listed as “closed” on MSHA’s website, prompting counsel for the Secretary of Labor in the contest proceedings to write a letter to the assigned judge in the case requesting that she dismiss the proceedings on the ground that the penalties had been paid by Performance. The judge granted the Secretary’s request on March 20, 2007.¹

Performance is now requesting that the penalty assessment be reopened so that it can challenge the two penalties that it intended to challenge originally. The Secretary of Labor, in her response to the motion to reopen, requests that Performance explain why the contest proceedings should be reopened, why it did not respond to the Secretary’s letter in the contest proceedings, and why it did not appeal the judge’s order dismissing those proceedings.

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).

¹ Neither Performance in its motion nor the Secretary in response to the motion states whether the penalties were actually paid.

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. 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.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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