

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December 15, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2008-1314-M
ADMINISTRATION (MSHA),	:	A.C. No. 26-01621-140819 HS6
	:	
v.	:	
	:	
LANG EXPLORATORY DRILLING	:	
	:	

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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 June 3, 2008, the Commission received from Lang Exploratory Drilling (“Lang”) a request 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 December 19, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a citation to Lang. On February 19, 2008, MSHA issued a proposed penalty assessment as a result of the citation. Lang asserts that the director of its parent company, who is responsible for reviewing and determining a course of action on penalty proposals, never received the proposed assessment. According to the director,¹ Lang had always

¹ In an affidavit attached to the motion, Tom Joiner, who is identified as a management systems director of Boart Longyear Co. (“Boart”), states that Lang is “a wholly owned subsidiary of Boart.” The citation, proposed assessment, and delinquency notice were all issued to Lang.

intended to contest the citation and the related penalty. Lang further states that on May 21, 2008, it received a letter from MSHA's Civil Penalty Compliance Office stating that the penalty was delinquent.

In response, the Secretary states that it opposes the request to reopen. The Secretary states that its records show that it sent the assessment to the operator's address of record and that it was signed for. Accordingly, the Secretary notes that the operator's statement that it did not receive the assessment is inaccurate.²

Lang filed a reply to the Secretary in which it states that the assessment was sent to the address of record, that it was received and signed for by an employee unfamiliar with MSHA procedures, and consequently that the operator failed to file a timely notice of contest. Lang further states that, when it received the notice of delinquency, it filed its "Notice of Opposition," which has been treated as a request to reopen.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessment forms 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).

² The assessment form indicates that it was sent to Lang, rather than Boart. Lang does not explain what type of system it had for forwarding mail to Boart and its director, who was responsible for reviewing penalty assessments.

Having reviewed Lang's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Lang'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

Robert F. Cohen, Jr., Commissioner

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