

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 22, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-1582-M
	:	A.C. No. 50-01850-159018 LWI
v.	:	
	:	
ALASKA MECHANICAL, INC.	:	

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 September 25, 2008, the Commission received from Alaska Mechanical, Inc. (“Alaska Mechanical”) a motion by counsel seeking to reopen a penalty assessment that may have 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 October 4, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Citation Nos. 6398234 and 6398235 to Alaska Mechanical. Alaska Mechanical contested the citations, which are the subject of Docket Nos. WEST 2008-152-RM and WEST 2008-153-RM and are currently stayed. The operator states that it received Proposed Assessment No. 000159018, which proposed civil penalties for the citations, on August 11, 2008, and thus its deadline for contesting the penalties was September 10, 2008. Alaska Mechanical further states that it sent its contest by Federal Express priority delivery on September 9, and that, contrary to the assertion in MSHA’s delinquency notice that MSHA received the contest on September 12, a tracking slip indicates that MSHA received the contest on September 10. Alaska asserts that it timely submitted its contest and that MSHA miscalculated applicable deadlines.

The Secretary states that she does not oppose Alaska Mechanical's request to reopen. She notes, however, that MSHA records show that the operator received the proposed penalty assessment on August 8, 2008. She asserts that the operator's contest filed on September 9 was filed one day late.

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).

On the record presently before us, we are unable to determine whether Alaska Mechanical timely contested the proposed penalty assessment. Specifically, it is unclear on what date (August 8 or August 11, 2008) Alaska Mechanical received the proposed penalty assessment.

If the company timely contested the proposed assessment, the proposed assessment has not become a final order of the Commission and the company's request for relief would be moot. *DS Mine & Dev. LLC*, 28 FMSHRC 462, 463 (July 2006).

Accordingly, we remand this matter to the Chief Administrative Law Judge for a determination of whether Alaska Mechanical timely contested the proposed penalty assessment at issue. If it is determined that the company did file a timely contest, the Chief Judge shall order further proceedings as appropriate pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. If it is determined that Palmer failed to timely contest the proposed assessment, the Chief Judge shall determine whether good cause exists for granting relief from the final order. *See Palmer Coking Coal Co.*, 30 FMSHRC \_\_\_\_, No. WEST 2008-934-M (Dec. 22, 2008).

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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