

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 9, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-313-M
	:	A.C. No. 45-03415-124697
v.	:	
	:	
INTERWEST CONSTRUCTION &	:	
DEVELOPMENT, INC.	:	

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 January 9, 2008, the Commission received from Interwest Construction & Development, Inc. (“Interwest”) a petition (which the Commission shall treat as a motion) 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 August 9, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued to Interwest the proposed penalty assessment at issue. The company asserts that it sent the form to MSHA on or about August 20, 2007, indicating that it wished to contest the proposed penalties. However, it subsequently learned from MSHA that the agency did not receive Interwest’s contest and that Interwest was delinquent in its payment of the penalties listed in the proposed assessment. The Secretary of Labor states that she does not oppose Interwest’s request for relief.

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 Interwest’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 Interwest’s apparent 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

Distribution:

Michael T. Heenan, Esq.,
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.,
2400 N Street NW, 5th Floor,
Washington, DC 20037

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,
Office of Civil Penalty Compliance,
MSHA,
U.S. Department of Labor,
1100 Wilson Blvd., 25th Floor,
Arlington, VA 22209-2247

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