FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 14, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-62
	:	A.C. No. 05-04591-125636 K393
v.	:	
	:	
TK CONSTRUCTION, LLC.	:	

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 October 11, 2007, the Commission received from TK Construction, LLC ("TK") a letter requesting that the Commission 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 August 22, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to TK. In its letter, TK states that it did not receive a copy of MSHA's proposed assessment until October 5, 2007. When TK subsequently contacted MSHA and indicated that it wished to contest Citation Nos. 6684324 and 6684325, MSHA informed it that the 30 days after receipt in which to timely contest the penalty assessment had already elapsed. The Secretary states that she does not oppose TK's request to reopen the penalty assessment.

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 TK's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether TK failed to timely contest the penalty proposal and, if so, whether good cause exists for granting relief from the final order. *See D.A.S. Sand and Gravel, Inc.*, 23 FMSHRC 1031, 1033 (Sept. 2001) (remanding to determine whether relief from final order was appropriate where operator alleged that it never received copy of the proposed penalty assessment). 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.

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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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