FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 7, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
	:	Docket No. WEST 2008-711-M
v.	:	A.C. No. 26-00081-134154-02
	:	
CHEMICAL LIME CO. OF ARIZONA	: :	

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY: Duffy, Chairman; Jordan and Young, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 20, 2008, the Commission received from Chemical Lime Co. of Arizona ("Chemical Lime") a motion by counsel seeking 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).

In September 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued 24 citations to Chemical Lime. Chemical Lime requested a conference on seven of the citations. According to Chemical Lime, an MSHA representative said that MSHA would take Chemical Lime's position under advisement. On December 13, 2007, MSHA issued a proposed assessment that included the citations that were discussed at the conference. Chemical Lime returned the assessment with the boxes checked next to citations other than the ones that it had discussed at the conference with MSHA. In a cover letter that accompanied the proposed assessment, Chemical Lime stated that "this contest is in addition to citations now waiting decision on conference." In a letter dated January 24, 2008, MSHA informed Chemical Lime that it had upheld six of the seven citations as issued and was modifying one citation.

According to Chemical Lime, it then learned that it was too late to contest the penalties related to the citations that had been discussed with MSHA at conference. The Secretary does not oppose the reopening of the assessments.

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 Chemical Lime'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 Chemical Lime's failure to timely contest the penalty proposals and whether relief from the final orders should be granted.[1] 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

[1] While our dissenting colleague suggests that we grant the operator's request, there is not a sufficient factual record to permit us to make such a decision in this case.

Commissioner Cohen, dissenting:

I do not believe that this matter needs to be remanded to the Chief Administrative Law Judge. Chemical Lime filed a motion to reopen a penalty assessment in which it described in detail why it did not file a notice of contest of the proposed penalty. Its motion was fully documented. The Secretary did not dispute any of the facts alleged by Chemical Lime, and so we accept them as true for purposes of this motion.

The undisputed facts establish that Chemical Lime questioned 14 of 24 citations issued against it by MSHA. As to seven of these citations, the operator timely requested a conference. The conference was held on October 29, 2007, at the conclusion of which MSHA informed Chemical Lime that it would reconsider these seven citations and let the operator know its position.

On December 13, 2007, while the seven conferenced citations were still being considered, MSHA issued penalty assessments as to all 24 citations. On January 8, 2008, Chemical Lime sent a timely notice of contest to MSHA in which it contested penalties resulting from seven citations which were not in the conference procedure. In an accompanying cover letter, Chemical Lime stated, "[n]ote that this contest is in addition to citations now waiting a decision on conference." Chemical Lime states that because the results of the conference had not yet been received, it did not know whether there would be any aspects of the seven conferenced citations in dispute. At the time, Chemical Lime was not represented by counsel.

On January 24, 2008, MSHA informed Chemical Lime that it was upholding six of the conferenced citations as issued and modifying the other citation. It was only then that Chemical Lime learned that the deadline for submitting a notice of contest was dependent on the date of the proposed penalty assessment rather than the date of the conference results. Chemical Lime acted within a reasonable time in submitting this motion to reopen with the Commission. The Secretary does not oppose this motion to reopen the penalty assessment.

Under these circumstances, I do not see how the Chief Administrative Law Judge can do anything but grant the Rule 60(b) motion for the reason that Chemical Lime's failure to timely file a notice of contest of the seven conferenced citations was the result of a reasonable mistake. Specifically, (1) Chemical Lime timely disputed the seven citations and sought to challenge them through the conference procedure; (2) while waiting the results of the conference, Chemical Lime timely filed a notice of contest of penalties for seven other citations and explicitly stated that this was "in addition to" the citations which were pending in conference; (3) Chemical Lime did not have legal counsel when it made the mistake of not contesting the penalty assessments on all 14 citations; and (4) Chemical Lime sought to rectify its mistake within a reasonable time.

In light of undisputed facts and a clearly reasonable mistake, I believe that the Commission itself should grant this motion rather than remand the case to the Chief Administrative Law Judge to reach the same result. The evidence presented on this record supports no other conclusion than that good cause existed for Chemical Lime's failure to timely contest the penalty assessment. Consequently, a remand to the Chief Administrative Law Judge would serve no purpose. *See American Mine Servs., Inc*., 15 FMSHRC 1830, 1834 (Sept. 1993).

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Robert F. Cohen, Jr., Commissioner

Distribution:

Ashley D. Brightwell, Esq.
Alton & Bird, LLP
One Atlantic Ctr.
1201 West Peachtree St.
Atlanta, GA 30309-3424

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. Dept. Of Labor
1100 Wilson Blvd., 25th Fl.
Arlington, VA 22209-3939

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