FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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August 1, 2008

SECRETARY OF LABOR,	:	Docket No. WEST 2008-823-M
MINE SAFETY AND HEALTH	:	A.C. No. 02-02964-135305
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2008-824-M
v.	:	A.C. No. 02-02130-135308
	:	
PIONEER SAND COMPANY	:	Docket No. WEST 2008-825-M
	:	A.C. No. 02-03181-135310

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").[1] On April 11, 2008, the Commission received from Pioneer Sand Company ("Pioneer") letters seeking to reopen three penalty assessments that had become final orders 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 January 8, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued three proposed penalty assessments to Pioneer. Pioneer states that it indicated on the proposed penalty assessment forms that it wanted to contest all the penalties and "promptly" mailed the forms to MSHA. However, it allegedly learned that MSHA had not received the penalty contest forms when MSHA sent delinquency notices on April 3, 2008.

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2008-823-M, WEST 2008-824-M, and WEST 2008-825-M, all captioned *Pioneer Sand Company* and involving similar procedural issues. 29 C.F.R. § 2700.12.

Although the Secretary notes that she has no record of receiving the penalty contest forms, she 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 Pioneer'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 Pioneer's failure to timely contest the penalty proposals and whether relief from the final orders should be granted. The Chief Administrative Law Judge should obtain from Pioneer supporting evidence regarding when Pioneer mailed the contest forms. 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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Robert F. Cohen, Jr., Commissioner

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