

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 25, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-861
	:	A.C. No. 42-01715-127742
v.	:	
	:	
GENWAL RESOURCES 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 April 18, 2008, the Commission received from Genwal Resources, Inc. (“Genwal”) a motion 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).

On September 21, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000127742 to Genwal, proposing a penalty for Citation No. 7286499 that previously had been issued to the company’s Crandall Canyon Mine. In its motion, Genwal asserts that because of two major accidents that occurred at the mine in August 2007, which resulted in nine fatalities, mining operations ceased entirely. In an accompanying declaration, James Poulson, the safety manager of Genwal’s parent company, states that the mine’s safety director was reassigned to another mine within a week or two after the August accidents and that, as a result, the proposed penalty assessment that was issued in September was misplaced until April 2, 2008, when Mr. Poulson discovered it among some unrelated personnel files. The Secretary does not oppose the motion to reopen the penalty

assessment but indicates that a notice of delinquency was mailed to Genwal on December 13, 2007.

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 Genwal’s motion 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 Genwal’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. In making that determination, the judge should consider that the proposed assessment was not sent until September 21, 2007, three weeks after rescue attempts had ceased. We also direct the judge to obtain from Genwal evidence regarding why it waited four months to respond to the delinquency notice dated December 13, 2007. 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

Robert F. Cohen, Jr., Commissioner

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