FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 4, 2004

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2002-83
v.	:	A.C. No. 46-01968-04392
CONSOLIDATION COAL COMPANY	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, 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. (1994) ("Mine Act"). On April 17, 2002, the Commission received from Consolidation Coal Company ("Consol") a motion made by counsel 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).

We have held, however, 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).

In its motion, Consol states that on January 17, 2002, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment (A.C. No. 46-01968-04392) to Consol's Blacksville No. 2 Mine. Mot. at 1. Consol further states that the proposed penalty assessment was issued in connection with a fatal injury to an employee of a contractor performing work at the mine. *Id.* Under an indemnification agreement with its contractor, the contractor is required to defend and indemnify Consol with respect to citations arising from the contractor's work. *Id.* Consol asserts that, at the time Consol received the proposed penalty assessment, various documents were being processed and forwarded to the contractor according to the indemnification obligations of the contract, and Consol was also served with a wrongful death suit by the estate of the contractor's employee. *Id.* Consol further asserts that, as a consequence of the exchange of documents with the contractor, the proposed penalty assessment was inadvertently mislaid and was only discovered after the time to file a timely request for hearing had passed. *Id.* at 1-2. Consol did not attach any supporting documentation to its motion. The Secretary states that she does not oppose Consol's request for relief.

Having reviewed Consol's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Consol's 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.

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Michael F. Duffy, Chairman

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Robert H. Beatty, Jr., Commissioner

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Mary Lu Jordan, Commissioner

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

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