

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

May 4, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2005-96
v.	:	A.C. No. 46-08645-35881
	:	
INDEPENDENCE COAL COMPANY	:	
d/b/a PROGRESS COAL COMPANY	:	

BEFORE: Duffy, Chairman; 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. (2000) (“Mine Act”). On March 29, 2005, the Commission received from Independence Coal Company d/b/a Progress Coal Company (“Progress”) 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).

In its motion, Progress states that on February 3, 2004, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued the company five citations in connection with a fatal accident at Progress’ Twilight MTR Surface Mine. Mot. at 1. Progress contested all five citations, which are the subject of Docket Nos. WEVA 2004-83-R through WEVA 2004-87-R and are currently stayed before Commission Administrative Law Judge Avram Weisberger. Mot. at 1-2. Progress states that, on February 18, 2005, it learned that it had failed to contest the proposed penalty assessments dated September 15, 2004 for two of the five citations that had been issued to Progress. *Id.* at 2. Upon an internal investigation, Progress

discovered that it had received the proposed assessment, that it had been subsequently misplaced, that the time to contest it had lapsed, and that it had never been paid. *Id.* at 2-3. In support of its motion, Progress has included an affidavit by Bryan J. Petrosky, the company's safety director. Mot. Tab A. The Secretary states that she does not oppose Progress' request for relief.

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 Progress' 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 Progress' 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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Mary Lu Jordan, Commissioner

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

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