# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 7, 2005

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| | : | Docket No. WEVA 2005-41 |
| v. | : | A.C. No. 46-01271-39038 |
| EASTERN ASSOCIATED COAL CORP. | : | |

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 December 7, 2004, the Commission received from Eastern Associated Coal Corp. ("Eastern") 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).

On September 30, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment (A.C. No. 46-01271-39038) to Eastern's Harris No. 1 Mine in Wharton, West Virginia. In its motion, Eastern states that, on the same day, Eastern's parent, Peabody Energy, Inc., closed its Henderson, Kentucky office which had handled Eastern's penalty contests and payments. Mot. at 1. Eastern asserts that on October 1, 2004, it informed its mines that penalties would be paid by its Charleston, West Virginia office and penalty contests would be handled by Peabody Energy's law department in St. Louis, Missouri. *Id.* at 1-2. Eastern asserts that on October 27, 2004, the Harris No. 1 Mine forwarded the proposed assessment to Peabody Energy's law department requesting payment for all

citations except Citation Nos. 7208626, 7221536, 7221537, and 7221538. *Id.* at 2. According to Eastern, a copy of the proposed assessment was forwarded by e-mail to the Charleston office for payment with a note to "check off" citations to be contested. *Id.* However, Eastern asserts the Charleston office never received the original proposed assessment and, as a consequence, it was not paid and Citations Nos. 7208626, 7221536, 7221537, and 7221538 were not contested. *Id.* Eastern did not attach any supporting documentation to its motion. The Secretary states that she does not oppose Eastern's 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 Eastern'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 Eastern'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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Mary Lu Jordan, Commissioner

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

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