

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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March 7, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2005-47
v.	:	A.C. No. 46-08645-30616
	:	
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 December 28, 2004, 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).

On June 30, 2004, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment (A.C. No. 46-08645-30616) to Progress’ Twilight MTR Surface Mine in Boone, West Virginia for 45 alleged violations, including Citation No. 4191465 and Order No. 4191466. In its motion, Progress states that on August 20, 2003, it had contested Citation No. 4191465 and Order No. 4191466, which are the subject of Docket Nos. WEVA 2003-240-R and WEVA 2003-241-R, and are stayed before Commission Administrative Law Judge T. Todd Hodgdon. Mot. at 1 & 4. Progress states the proposed assessment was sent by certified mail to the attention of Bryan Petrosky, Progress’ safety

director, but that it was signed for by a temporary summer student employee on July 12, 2004. *Id.* at 2-3. Progress asserts that it was not until September 1, 2004, that Mr. Petrosky received the proposed assessment, placed check marks in the boxes next to the citations and orders he intended to contest, and requested that Progress' accounting department pay the assessment for the remaining citations. *Id.* Progress states that, on September 9, 2004, MSHA received its payment but not its contest of civil penalty. *Id.* at 2. According to Progress, MSHA did not understand which cases were being paid. *Id.* Progress asserts the check stub attached to its check listed three invoice numbers, one of which coincides with this case. *Id.* at 2-4. Progress attached copies of three documents to its motion: Mr. Petrosky's affidavit, its contest of civil penalty, and its record of payment. 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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