

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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December 5, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2007-125-M
v.	:	A.C. No. 46-00016-72428
	:	
GREER LIMESTONE COMPANY	:	

BEFORE: Duffy, Chairman; Jordan 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 November 13, 2006, the Commission received from Greer Limestone Company (“Greer”) a motion from its counsel 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 August 10, 2005, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Citation No. 6034410 to Greer. MSHA subsequently sent the operator correspondence dated November 2, 2005, stating that MSHA had conducted a special investigation related to Citation No. 6034410, that it had “decided not to pursue further investigative action at th[e] time and [that] the case [wa]s closed.” Mot., Ex. 4. MSHA later sent a proposed assessment dated November 16, 2005, to the operator proposing penalties for Citation Nos. 6034410 and 6024363. Greer states that it paid the penalty associated with

Citation No. 6024363 and, approximately on December 2, 2005, returned to MSHA the notice contesting the penalty proposed for Citation No. 6034410. MSHA later tried to collect as delinquent the penalty associated with Citation No. 6034410. Greer requests that the Commission reopen the proceedings, conclude that “this matter [is] officially closed,” and remove any assessment relating to Citation No. 6034410 from all future invoices. Mot. at 5.

The Secretary responds that she has no record that the penalty contest form was received by MSHA’s Civil Penalty Compliance Office, but that she has no basis for questioning that the form was sent. Consequently, the Secretary states that she does not oppose Greer’s request to reopen the penalty assessment. The Secretary further states that she does oppose the request that the proceedings be closed, however. She explains that the MSHA letter dated November 2, 2005, merely announced the closing of the special investigation, and that the letter did not purport to “close” the citation itself. Resp. at 1.

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 Greer's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Greer'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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Michael G. Young, Commissioner

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