FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 26, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2007-201
	:	A.C. No. 46-01816-95764
v.	:	
PINNACLE MINING COMPANY, LLC	:	

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 December 1, 2006, the Commission received from Pinnacle Mining Company, LLC ("Pinnacle") 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 April 3, 2006, the Department of Labor's Mine Safety and Health Administration issued Citation No. 3749381 to Pinnacle. Pinnacle contested that citation in Docket No. WEVA 2006-411-R, and the case was subsequently stayed pending assessment of a penalty.

Upon receipt of the penalty assessment for the citation, however, Pinnacle paid the assessment. Counsel for the Secretary in the contest proceeding notified the judge in that case and Pinnacle of the payment by letter dated October 26, 2006, but Pinnacle did not respond. Consequently, on November 20, 2006, the judge lifted the stay and dismissed the contest proceeding. In its motion to reopen the penalty proceeding, Pinnacle states that payment of the penalty was inadvertent and that it meant to contest the penalty assessment along with the

underlying citation. The motion is accompanied by an affidavit of Pinnacle's Safety Director, who states that he "inadvertently paid" the proposed penalty for the citation in question.

In her response to the motion to reopen, the Secretary states that Pinnacle's statement that the civil penalty proceeding should be reopened because payment of the penalty was inadvertent is only a conclusory statement that provides no explanation as to why its failure to contest the penalty proceeding should be excused. The Secretary requests that the Commission direct Pinnacle to provide a detailed explanation of the basis for its motion to reopen and states that, upon receipt of that explanation, the Secretary will take a position on Pinnacle's motion to reopen.

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 Pinnacle's motion and the Secretary's response thereto, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Pinnacle's failure to timely contest the penalty proposal and whether relief from the final order should be granted. The issues raised by the Secretary involve fact finding that is the province of an administrative law judge in the first instance. Consequently, the judge to whom this case is assigned should consider the Secretary's response. If the judge eventually determines that reopening is warranted, 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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