FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 4, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2007-843
	:	A.C. No. 46-01433-118871
v.	:	
	:	
CONSOLIDATION COAL 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 September 17, 2007, the Commission received from Consolidation Coal Company ("Consol") 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 May 25, 2007, the Department of Labor's Mine Safety and Health Administration issued assessment No. 000118871 to Consol, proposing a penalty for an order that previously had been issued at Consol's Loveridge mine. Consol states that its safety supervisor at that mine, who normally processed proposed assessments, did not process the assessment for contest before he retired in mid-June. Instead, on June 6, 2007, the proposed assessment was forwarded to Consol's headquarters, and Consol paid the proposed penalty. According to Consol, the safety supervisor's replacement was unfamiliar with the procedures for contesting proposed penalties. The replacement's failure to timely process other proposed assessments led Consol to discover that it had failed to contest the instant assessment, as it now states that it had intended. Consol

submits that its payment of the assessment was in error. The Secretary states that she does not oppose Consol's request to reopen the proposed penalty assessment.

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 Consol'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 Consol'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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