

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

June 11, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2008-492
	:	A.C. No. 46-07009-127178
v.	:	
	:	
ELK RUN COAL COMPANY, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners<sup>1</sup>

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 January 28, 2008, the Commission received from Elk Run Coal Company, Inc. (“Elk Run”) a motion 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 July 24, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued citation numbers 7270248, 7270249, and 7270250 to Elk Run. On or about September 13, 2007, MSHA issued a proposed penalty assessment to Elk Run, which included proposed penalties for these citations. Elk Run states that soon after receiving the proposed

---

<sup>1</sup> Commissioner Robert F. Cohen, Jr., assumed office after this case had been filed. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Cohen has elected not to participate in this matter.

penalty assessment, its safety director faxed the penalty assessment form to Elk Run's counsel. Elk Run explains that its counsel consulted with the mine foreman, who directed counsel to contest the assessments for these three citations. Elk Run asserts that on or about October 18, 2007, its attorney timely contested the other penalties that the operator intended to contest, but inadvertently failed to contest the penalties for these three citations, due to her clerical error.

Elk Run claims that this omission was discovered on October 22, 2007 and that it immediately reported it to MSHA's Office of Assessments. Elk Run asserts that "Citation Number 7270248 is now closed, and Citation Numbers 7270249 and 7270250 are now delinquent." The Secretary states that she does not oppose Elk Run'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 Elk Run'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 Elk Run's failure to timely contest the penalty proposal and whether relief from the final order should be granted. On remand, the judge should determine the status of the three penalties at issue (including the penalty for the citation referred to as "closed" by Elk Run's counsel). 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.

---

Michael F. Duffy, Chairman

---

Mary Lu Jordan, Commissioner

---

Michael G. Young, Commissioner

Distribution:

Ramonda C. Lyons, Esq.  
Dinsmore & Shohl, LLP  
P. O. Box 11887  
900 Lee Street, Suite 600  
Charleston, WV 25339

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
1100 Wilson Blvd., Room 2220  
Arlington, VA 22209-2296

Myra James, Chief  
Office of Civil Penalty Compliance  
MSHA  
U.S. Department of Labor  
1100 Wilson Blvd., 22<sup>nd</sup> Floor  
Arlington, VA 22209-2296

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001-2021