

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 29, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2008-510
	:	A.C. No. 46-04387-121572
v.	:	
	:	
DANA MINING COMPANY, INC.	:	

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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 February 6, 2008, the Commission received from Dana Mining Company, Inc. (“Dana Mining”) a motion made by counsel to reopen a penalty assessment that may have 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 10, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000121572 to Dana, proposing penalties for 26 citations that had been issued to the company during the preceding months. Dana Mining states that on July 23, 2007, its safety director, Gary Dixon, returned the contest form to MSHA indicating its intent to contest 12 of the proposed penalties and that it paid the remainder of the penalties on August 1, 2007. However, evidence of the alleged July 23, 2007, notice of contest was not included in the motion. In addition, Dana Mining’s counsel separately submitted the form to contest one of those 12 penalties, and the contest submitted by counsel is presently the subject of Docket No. WEVA 2007-662. Dana Mining states that it subsequently began receiving delinquency notices that included the 11 penalties it believes it had contested. The

Secretary's response does not state whether the initial notice of contest was received, but does not oppose reopening this matter as to the 11 penalties.

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 Dana Mining's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Dana Mining timely contested the penalty proposal and, if not, whether good cause exists for granting relief from the final order. Before granting such relief, the judge should require Dana Mining to provide evidence of the July 23, 2007, notice of contest by Mr. Dixon. After that, 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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Robert F. Cohen, Jr., Commissioner

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