FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 22, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2008-513
	:	A.C. No. 46-01437-112645
v.	:	
MCELROY COAL COMPANY	:	

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 McElroy Coal Company ("McElroy") 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).

In May 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued six orders to McElroy, and on March 5, 2007, issued Proposed Assessment No. 000112645, which proposed penalties for each of those orders. According to McElroy, by letter dated March 16, 2007, a copy of which is attached to the motion to reopen, McElroy notified MSHA that it was contesting all of the penalties.

While the Secretary states that she does not oppose McElroy's request to reopen, she notes that she has no record of receiving McElroy's letter contesting the penalty assessment. She further notes that MSHA notified McElroy by letter dated June 22, 2007, that it was delinquent in paying the assessment. She states that McElroy sent a faxed contest to MSHA on August 31,

2007, but the Secretary does not include a copy of that fax or address whether it was a new contest or a copy of the March 16 contest letter McElroy has now submitted to the Commission. The Secretary states that it sent a second delinquency letter to McElroy on October 4, 2007, which explained that the August 31 contest was sent too late to be accepted.

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 McElroy's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether McElroy 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 McElroy to more fully explain its communications with MSHA regarding this assessment between the time the assessment was issued in March 2007 and its filing of the request to reopen in February 2008. After that, if it is determined that relief from the final order 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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