

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

June 6, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2008-538
v.	:	A.C. No. 46-08582-118898
	:	
SIMMONS FORK MINING, 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 14, 2008, the Commission received from Simmons Fork Mining, Inc. (“Simmons Fork”) a motion by counsel seeking 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 29, 2007, the Department of Labor’s Mine Safety and Health Administration issued a proposed penalty assessment to Simmons Fork for three citations that had been issued to the operator in January and April of 2007. Simmons Fork had contested the citations, and the three contest proceedings were stayed pending the assessment of penalties. Simmons Fork states that, consequently, it expected that its counsel in the contest proceedings would be notified by the Secretary when the assessments were issued, but its counsel was not notified. Simmons Fork also states that it has no record of receiving the proposed penalty assessment.

The Secretary states that she does not oppose the reopening of the assessment. The Secretary notes that proposed penalty assessments are always mailed directly to the operator, and that it is the operator’s responsibility to forward the assessment to its counsel. The Secretary also

attaches to her response documentation that the assessment was delivered on June 4, 2007, to Charleston, WV, the city shown as Simmons Fork's address on the proposed assessment. The Secretary also states that she notified Simmons Fork by letter dated August 30, 2007, that it was delinquent in paying the assessment at issue. Simmons Fork gives no explanation why it took over five months to take action once it received the letter advising that it was delinquent in paying the 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 Simmons Fork's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Simmons Fork'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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Robert F. Cohen, Jr., Commissioner

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