

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

October 15, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2008-565
	:	A.C. No. 46-05978-132359
v.	:	
	:	
JACOB MINING COMPANY, LLC	:	

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 19, 2008, the Commission received from Jacob Mining Company, LLC (“Jacob Mining”) 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 July 28, 2006, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued four citations to Jacob Mining. The company timely filed notices of contest for each of the citations, and the consolidated contest proceeding was stayed pending issuance of proposed penalty assessments for the citations. Jacob Mining states, however, that when penalties for two of the citations were proposed in Assessment No. 000132359, issued by MSHA on November 21, 2007, the assessment was inadvertently placed with other assessments sent to the company’s accounting department for payment. The operator further states that the assessment was consequently paid.

While the Secretary states that she does not oppose Jacob Mining's request to reopen, she also notes that as of March 6, 2008, MSHA had not received the payment of the penalty assessment that the operator alleges it remitted.

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).

The Secretary's statement that MSHA had not received the penalty payments from Jacob Mining is consistent with her statement earlier this year in the contest proceeding that the penalty payments at issue here were delinquent. It was that statement which prompted the judge in the contest proceeding to issue a Show Cause Order regarding whether the contests should be dismissed because of the apparent failure to contest the penalty assessments, and it is that Show Cause Order that, according to Jacob Mining, prompted it to seek reopening of the penalty assessments. Thus, Jacob Mining's professed reason for seeking reopening—inadvertent payment—is contradicted by the Secretary's records.

Having reviewed Jacob Mining's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Jacob Mining'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 2700.¹

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

¹ The parties should immediately consult with one another, and try to resolve the dispute over whether Jacob Mining paid the two penalties, so as to narrow the issues before the Chief Administrative Law Judge.

Distribution:

Mark E. Heath, Esq.
Spilman, Thomas & Battle, PLLC
300 Kanawha Blvd. East
P.O. Box 273
Charleston, WV 25321

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., 25th Floor
Arlington, VA 22209-3939

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