FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 14, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2008-82
	:	A.C. No. 46-01968-112670
v.	:	
	:	
CONSOLIDATION COAL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan and Young, 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 October 25, 2007, the Commission received from Consolidation Coal Company ("Consol") a motion requesting that the Commission 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 March 6, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Consol covering several citations and orders. In its motion, Consol claims that on March 16, 2007, it sent a letter contesting the citations and orders at issue to MSHA's Civil Penalty Compliance Office located in Arlington, Virginia. A copy of the March 16 letter is attached to Consol's motion. Consol also submits a copy of a check dated March 21, 2007, that it states was separately sent to MSHA as partial payment for those citations contained on the proposed penalty assessment form that it did not contest. The Secretary states that although she does not oppose Consol's request to reopen the penalty assessment, she has no record of receiving the contest of the proposed penalty assessment at MSHA's Arlington office.

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).

On the basis of the present record, we are unable to evaluate the merits of Consol's position. It is unclear from the record whether the proposed civil penalties at issue became final orders because MSHA erred in processing Consol's contest or because of some inadvertence on the part of Consol. In the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Consol failed to timely contest the penalty proposal and, if so, whether good cause exists for granting relief from the final order. *See Penn American Coal, L.P.*, 23 FMSHRC 1021 (Sept. 2001) (remanding to determine whether relief from final order was appropriate where operator alleged a processing error by MSHA). 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

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