

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

March 29, 2004

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

CERTIFIED ROAD
CONSTRUCTORS, INC.

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Docket No. YORK 2003-62-M
A.C. No. 30-00927-05531

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, 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. (1994) (“Mine Act”). On April 3, 2003, the Commission received from Certified Road Constructors, Inc. (“CRC”) a request 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).

In its request, CRC states that two citations were included in the proposed assessment, issued on October 31, 2002, that is the subject of these proceedings (A.C. No. 30-00927-05531). Mot. CRC states its Safety Director responded to the assessment by paying the proposed penalty for one citation but checked the box on the assessment sheet indicating that CRC requested a conference on the other citation. *Id.* Upon being notified by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) in early March 2003 that the penalty for the unpaid assessment was delinquent, CRC attempted to determine from MSHA what had happened to its request for a conference on the second citation. *Id.* CRC states that it was unsuccessful in doing

so. *Id.* Attached to CRC's request is a copy of the assessment, which does not indicate which citation was paid and which citation the operator wished to conference. The Secretary states that she does not oppose CRC's request for relief.

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 CRC'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 CRC'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.

Michael F. Duffy, Chairman

Robert H. Beatty, Jr., Commissioner

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Distribution

Safety Director
Certified Road Constructors, Inc.
P.O. Box 8
Grange Road
West Sand Lake, NY 12196

W. Christian Shumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

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