

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

June 13, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. YORK 2006-47-M
ADMINISTRATION (MSHA)	:	A.C. No. 28-00546-80198 A
	:	
v.	:	Docket No. YORK 2006-48-M
	:	A.C. No. 28-00546-80200 A
MARVIN R. BLETHEN,	:	
GENE GARRON, and	:	Docket No. YORK 2006-49-M
JOHN HUGHES,	:	A.C. No. 28-00546-80201 A
employed by WHIBCO, INC.	:	

BEFORE: Duffy, Chairman; 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. (2000) (“Mine Act”).¹ On May 1, 2006, the Commission received separate (though largely identical) motions made by counsel on behalf of Marvin R. Blethen, Gene Garron, and John Hughes (“the respondents”), all employees of Whibco Inc., to reopen penalty assessments against each employee under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under the Commission’s Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers YORK 2006-47-M, YORK 2006-48-M, and YORK 2006-49-M, in which all the respondents are employees of Whibco Inc., and which all involve similar procedural issues. 29 C.F.R. § 2700.12.

In their motions to reopen, the respondents state that when they received proposed penalty assessments from the Department of Labor’s Mine Safety and Health Administration (“MSHA”) during February 2006, they gave them to Whibco Inc. office staff “for processing.” Mot. at 1. The respondents further state that although they intended to contest the assessments, they failed to do so in a timely fashion “due to staff turnover” at Whibco Inc., and that the “uncontested forms were only discovered when [the cases were] assigned to the undersigned counsel.” *Id.* at 1-2. The Secretary does not oppose any of the respondents’ requests for relief.

The Commission possesses jurisdiction to reopen uncontested assessments that have become final Commission orders. *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final 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 the respondents' motions, in the interests of justice, we remand these matters to the Chief Administrative Law Judge to determine whether good cause exists to reopen these proceedings. If it is determined that such relief is appropriate, these cases 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

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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