FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 20, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. YORK 2007-90-M
	:	A.C. No. 19-00040-104183
v.	:	
AGGREGATE INDUSTRIES, NORTHEAST REGION	:	

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 August 8, 2007, the Commission received from Aggregate Industries, Northeast Region ("Aggregate Industries") a motion made by counsel 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 August 29 and 30, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation Nos. 6042056 and 6042063, respectively, to Aggregate Industries. Aggregate Industries timely contested the citations in Docket Nos. YORK 2006-99-RM and 2006-100-RM. MSHA subsequently issued to Aggregate Industries a proposed penalty assessment relating to the citations. In its motion, Aggregate Industries explains that the personnel responsible for reviewing proposed penalties "overlooked" its contest of the citations and inadvertently authorized payment of the proposed penalties. The operator further states that its failure to timely file its contest of the proposed penalty assessment was the result of inadvertence or a mistake and miscommunication within its operation.

In her response to the motion to reopen, the Secretary states that Aggregate Industries' statement that the civil penalty proceeding should be reopened because payment of the penalties was inadvertent is only a conclusory statement that provides no explanation as to why its failure to contest the penalty proceeding should be excused. The Secretary requests that the Commission remand the matter to the judge to provide the operator an opportunity to satisfy the requirements for reopening.

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 Aggregate Industries' motion and the Secretary's response thereto, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Aggregate Industries' failure to timely contest the penalty proposals 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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