FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 30, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2008-538
v.	:	A.C. No. 15-10753-119562
	:	
CLEAN ENERGY MINING COMPANY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners[1]

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 12, 2008, the Commission received from Clean Energy Mining Company ("Clean Energy") 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 June 6, 2007, the Department of Labor's Mine Safety and Health Administration issued a proposed assessment to Clean Energy for 30 citations that had been previously issued to the operator. Clean Energy states that, following receipt of the assessment, it faxed the proposed

[1] Commissioner Robert F. Cohen, Jr., assumed office after this case had been filed. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Cohen has elected not to participate in this matter.

assessment to one office of the law firm which represented it in proceedings before the Commission. That office was to fax the assessment to another office of the law firm which was responsible for submitting the contest form. According to Clean Energy, the second office never received the fax in this instance, however, so the operator did not contest 18 of the proposed penalties that it states it intended to contest, and instead paid only 12 of the penalties. The Secretary states that she does not oppose the reopening of the assessment as to those 18 penalties.[2] In her response in this proceeding, the Secretary also notes that she notified Clean Energy by letter dated September 6, 2007, that it was delinquent in paying the assessment at issue here.

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).

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[2] This is the second of three proceedings involving the same law firm where a breakdown in office procedures has been cited as the reason for contests not being filed. Orders are also being issued today in the other two proceedings, *Road Fork Development Co.*, Docket No. KENT 2008-512, and *Long Fork Coal Co.*, Docket No. KENT 2008-633. In her letter in response to the motion filed in *Long Fork*, the Secretary urges that counsel take steps to ensure that such breakdowns do not continue and that penalty assessments are timely contested. We agree with this recommendation.

Having reviewed Clean Energy'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 Energy'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.

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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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