

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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October 15, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2008-422-M
v.	:	A.C. No. 11-03114-136303
	:	
VOSS SAND WORKS, INC.	:	

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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 May 19, 2008, the Commission received from Voss Sand Works, Inc. (“Voss Sand”) a letter seeking to 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 January 16, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000136303 to Voss Sand, proposing civil penalties for three citations. Voss Sand did not respond to the Proposed Assessment. On April 24, 2008, the Secretary issued a Notice of Delinquency to Voss Sand.

In response to the Notice of Delinquency, Voss Sand sent a letter to the Secretary on May 13, 2008. Voss Sand stated that it did not receive the proposed assessment and requested a hearing on the citations. Voss Sand attached to its request the delinquency notice from MSHA seeking payment of the penalties.

The Secretary states that she does not oppose Voss Sand's request to reopen the proposed assessment. She notes, however, that the proposed assessment was sent by Federal Express to the address of record, but was returned undelivered. The Secretary further urges the operator to take all steps necessary to ensure that, in the future, any penalty assessments are contested in a timely manner. For clarity, the Secretary attached to her response the proposed assessment and Federal Express tracking record.¹

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).

¹ On June 9, 2008, the Commission received from Voss an “Answer to Contest the Petition for Assessment of a Penalty.” The answer is premature. An operator is required to file an answer within 30 days after service of a petition for assessment of penalty filed by the Secretary. 29 C.F.R. § 2700.29. The Secretary’s petition for assessment of penalty is not filed until after the operator submits a timely contest of the proposed penalty assessment. *Id.* Here, Voss did not timely contest the proposed assessment. Voss’s May 13, 2008 letter constitutes a request to reopen the assessment. Because the Secretary has not filed a petition for assessment of penalty, Voss is not required to file an answer. Accordingly, we strike the answer filed by Voss from the record.

Having reviewed Voss Sand's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for granting Voss Sand relief from the final order. If it is determined that relief from the final order 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

Robert F. Cohen, Jr., Commissioner

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