

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 13, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2006-315-M
v.	:	A.C. No. 40-02968-85077
	:	
MOLTAN COMPANY, LP	:	

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 September 6, 2006, the Commission received from Moltan Company, LP (“Moltan”) a letter 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).

In February 2006, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued several citations to Moltan. MSHA subsequently assessed penalties against Moltan for these citations in proposed assessment A.C. No. 000085077. Moltan states that it timely contested the proposed assessment and disputes the date claimed by the Secretary for Moltan’s receipt of the proposed assessment. Moltan alleges that it has requested a proof of delivery for the proposed assessment from MSHA, which had not been produced by the time of its letter seeking to reopen. Neither Moltan nor the Secretary has submitted the penalty assessment at issue or any documentation concerning its receipt by Moltan. The Commission has not been provided with the date of the penalty assessment and has no basis for determining

whether Moltan actually received the assessment and, if so, whether it contested the proposed assessment in a timely manner. The Secretary states that she does not oppose Moltan's request to reopen the penalty assessment.

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 Moltan's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Moltan failed 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

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Distribution

Larry Gurley, Chief Operating Officer
Moltan Company
7125 Riverdale Bend Road
Memphis, TN 38125-4442

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

Myra James, Chief
Office of Civil Penalty Compliance
U.S. Department of Labor, MSHA
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209

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