FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

May 21, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2007-394-M
	:	A.C. No. 02-03131-103872 1PL
	:	
v.	:	Docket No. WEST 2007-395-M
	:	A.C. No. 02-00024-106188 1PL
AKER KVAERNER INDUSTRIAL	:	
CONSTRUCTORS, INC.	:	

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").[1] On April 19, 2007, the Commission received from Aker Kvaerner Industrial Constructors, Inc. ("Aker Kvaerner") a letter to reopen two penalty assessments that had become final orders 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 November 21, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued proposed penalty assessment No. 103872 to Aker Kvaerner. On December 19, 2006, MSHA issued proposed penalty assessment No. 106188 to Aker

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[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2007-394-M and WEST 2007-395-M, both captioned *Aker Kvaerner Industrial Constructors, Inc.* and both involving similar procedural issues. 29 C.F.R. § 2700.12.

Kvaerner. With respect to proposed penalty assessment No. 106188, Aker Kvaerner asserts that it first received notice of the proposed penalty assessment when it received a notice of delinquency in March 2007. It alleges that the proposed assessment was mailed to a former, incorrect address. With respect to proposed penalty assessment No. 103872, Aker Kvaerner asserts that it first learned of the proposed penalty assessment from a subsequent discussion with MSHA informing it that the penalty was also delinquent, apparently because the proposed assessment had also been sent to the same incorrect address. Aker Kvaerner further states that MSHA indicated that it would re-mail the notice of the proposed assessment and "re-set" the 30 days in which to request a formal hearing. Aker Kvaerner alleges that it returned the contest of the proposed penalty upon receipt but that it subsequently learned from MSHA that it needed to contact the Commission to reopen the proceeding. On those bases, Aker Kvaerner requests that the Commission reopen the proceedings. The Secretary states that she does not oppose Aker Kvaerner's request to reopen.

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) 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 Aker Kvaerner'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 Aker Kvaerner's failure to timely contest the penalty proposals and whether relief from the final orders 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

Distribution

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