

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 8, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-374-M
	:	A.C. No. 26-01089-118117
v.	:	
	:	
BARRICK GOLDSTRIKE MINES, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners<sup>1</sup>

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 January 31, 2008, the Commission received from Barrick Goldstrike Mines, Inc. (“Barrick”) 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 December 30, 2006, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Citation No. 6394157 to Barrick. Barrick states that, subsequently, it timely filed a contest of the citation and a contest of a proposed penalty of \$60 set forth in Proposed Assessment No. 000115861 related to Citation No. 6394157. Barrick

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<sup>1</sup> 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.

explains that, by letter dated May 18, 2007, MSHA informed Barrick that it was removing Citation No. 6394157 from Proposed Assessment No. 000115861 and that MSHA would re-assess the penalty under a new MSHA case number. The operator submits that, subsequently, it was informed that Barrick was delinquent in paying a penalty of \$5,000 for Citation No. 6394157, which was set forth in Proposed Assessment No. 000118117. Barrick states that prior to receiving the delinquency notice, it had not received Proposed Assessment No. 000118117. Upon investigating the matter, Barrick was informed by MSHA that it had postal tracking information indicating that Proposed Assessment No. 000118117 had been delivered to the operator, but that MSHA could not produce such documentation. The Secretary states that she does not oppose the reopening of 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 Barrick'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 Barrick'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

Distribution:

Michael T. Heenan, Esq.  
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.  
2400 N Street NW, 5<sup>th</sup> Floor  
Washington, DC 20037

Anthony J. Marcavage, Esq.  
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.  
2400 N Street., N. W., 5<sup>th</sup> Floor  
Washington, D.C. 20037

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
1100 Wilson Blvd., 22<sup>nd</sup> Floor  
Arlington, VA 22209-2296

Myra James, Chief  
Office of Civil Penalty Compliance  
MSHA  
U.S. Department of Labor  
1100 Wilson Blvd., 25<sup>th</sup> Floor  
Arlington, VA 22209-3939

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