

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 27, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2008-383-M
v.	:	A.C. No. 45-03627-128809
	:	
AAA READY-MIX INC. II	:	

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 February 1, 2008, the Commission received from AAA Ready-Mix Inc. II (“AAA”) 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).

AAA states that it is a small operator that was first inspected by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) over the course of three days in April 2007. As a result, MSHA issued 13 citations to AAA. The company states that it resolved to seek review of all of the citations, and anticipated that the citations would be the subject of a single case. However, only eight of the citations were the subject of the first penalty assessment, issued by MSHA on June 6, 2007. AAA contested all eight of the penalties, but those penalties became the subject of two dockets when the Secretary filed two petitions for assessment of penalties, one for six of the penalties and another for the other two penalties.

It was not until October 10, 2007, that MSHA issued Proposed Assessment No. 000128809, which proposed penalties for four of the five remaining citations. AAA states that it never received that assessment and first learned that the assessment had been issued when it received a delinquency notice with respect to those penalties in January 2008.

The Secretary states that she does not oppose the reopening of the assessment as to the four penalties. Nevertheless, the Secretary attaches to her response documentation that Proposed Assessment No. 000128809 was delivered to AAA on October 17, 2007, and signed for by “M. Hansen.” On the initial proposed assessment that AAA timely contested, “Marilyn Hansen” is shown as the AAA representative to whose attention that assessment was sent.

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 AAA'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 AAA'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.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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