

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

February 2, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2008-1861
ADMINISTRATION (MSHA),	:	A.C. No. 46-09086-135505
	:	
v.	:	
	:	
BRODY MINING, LLC	:	
	:	

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. (2006) (“Mine Act”). On September 23, 2008, the Commission received from Brody Mining, LLC (“Brody”) a request by counsel 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 January 8, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000135505 to Brody proposing civil penalties for violations alleged in 15 citations. Brody states that on approximately January 24, 2008, its safety director mailed the proposed assessment and a check to MSHA to pay 11 of the 15 penalties. Of the 15 citations in the Proposed Assessment that was returned to MSHA, Citation Nos. 7280178, 7280180, 9967987, and 9967988 were checked for contest and blackened out. The operator submits that on the same date, the safety director also faxed copies of the Proposed Assessment and check to MSHA’s Civil Penalty Compliance Office and copied counsel on the fax. Counsel states that he mistakenly believed that the safety director was contesting the four citations, while the safety director believed that counsel would separately contest the citations. Brody states that

MSHA has since marked Citation Nos. 7280178, 7280180, 9967987, and 9967988 as delinquent and the remaining citations in the case, to which payment was applied, as closed.

In response, the Secretary states that she opposes the request to reopen. The Secretary explains that on April 3, 2008, MSHA sent the operator a notice indicating that the assessment had become a final order on February 14, 2008. She submits that the notice, which was sent to the address listed on the operator's legal identity form, was returned to MSHA as "undelivered."<sup>1</sup> The Secretary contends that the operator fails to explain why, after MSHA had informed it that it had not contested the Proposed Assessment, it took over half a year to request reopening.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessment forms 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).

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<sup>1</sup> The Secretary notes that the notice was sent to the same address as the Proposed Assessment, which the operator states that it received.

Having reviewed Brody'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 Brody's failure to timely contest the penalty proposal and whether relief from the final order should be granted. We ask the Judge, in considering the matter, to ascertain the reasons for the delay of the operator in seeking relief from the final order. 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

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Robert F. Cohen, Jr., Commissioner

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