FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

August 30, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2004-345-M
ADMINISTRATION (MSHA)	:	A.C. No. 45-03455-20609
	:	
v.	:	Docket No. WEST 2004-352-M
	:	A.C. No. 45-03224-20531
WASHINGTON ROCK QUARRIES, INC.	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, 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 June 2, 2004, the Commission received from Washington Rock Quarries, Inc. ("Washington Rock") a motion filed by counsel to reopen penalty assessments that became 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).

In its motion, Washington Rock states that in January 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued numerous citations for its Champion and King Creek Pits, located in Pierce, Washington. Mot. at 1-2; Affidavit of John M. Payne

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[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2004-345-M and WEST 2004-352-M, both captioned *Washington Rock Quarries, Inc.* and both involving issues similar to those addressed in this order. 29 C.F.R. § 2700.12.

("Payne Aff.") at 2; Ex. C. Washington Rock also states that it intended to contest the citations, but that the company's owner, Harry Hart, did not understand the contest procedure. Mot. at 2; Affidavit of Harry Hart ("Hart Aff.") at 1. It further states that Hart told MSHA's inspector that he wanted to contest all citations, and was informed that there was no longer a "ten-day period" and that he should wait until he received all the citations. Mot. at 2; Hart Aff. at 2. The operator asserts that Hart then contacted MSHA's Western District Conference Litigation Supervisor ("CLS") and that in early March 2004, the CLS scheduled a conference for April 8, 2004. Mot. at 2-3; Hart Aff. at 2. Washington Rock claims that on March 12, 2004, it received the subject proposed assessments dated March 4, 2004 (A.C. Nos. 45-03455-20609 and 45-03224-20531) and that it subsequently obtained counsel to assist in the conference, which had to be rescheduled due to scheduling conflicts. Mot. at 3; Hart Aff. at 2; Payne Aff. at 2. The operator also alleges that, at that time, the CLS informed its counsel that the deadline to contest several citations had passed and agreed to confer on only those citations that had not already been assessed. Mot. at 3; Payne Aff. at 2. Subsequently, the operator received two proposed assessments for the other citations that were issued in January 2004, and submitted timely notices of contest for those assessments. Mot. at 4; Payne Aff. at 2-3. Washington Rock requests the Commission reopen the two proposed assessments (A.C. Nos. 45-03455-20609 and 45-03224-20531) so it may proceed to a hearing on the merits. Mot. at 1, 9. The Secretary states that she does not oppose Washington Rock's request for relief.

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 Washington Rock's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Washington Rock'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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Robert H. Beatty, Jr., Commissioner

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Mary Lu Jordan, Commissioner

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

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