

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

June 13, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. YORK 2006-50-M
ADMINISTRATION (MSHA)	:	A.C. No. 28-00546-59403
	:	
	:	
v.	:	Docket No. YORK 2006-51-M
	:	A.C. No. 28-00546-64603
WHIBCO OF NEW JERSEY, INC.	:	

BEFORE: Duffy, Chairman; 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 May 2 and 3, 2006, the Commission received from Whibco of New Jersey, Inc. (“Whibco”) motions made by counsel 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).

In its motions, Whibco states as follows: On June 14, 2005, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued the first proposed penalty assessment at issue to Whibco. Mot. at 1. Whibco states that although it intended to contest the assessment, it failed to do so in a timely fashion because company personnel were unfamiliar with contest procedures. *Id.* at 1-2. On August 16, 2005, MSHA issued the second proposed penalty

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers YORK 2006-50-M and YORK 2006-51-M, both captioned *Whibco of New Jersey, Inc.* and both involving similar procedural issues. 29 C.F.R. § 2700.12.

assessment at issue to Whibco. Mot. at 1. Whibco states, however, that the proposed assessment “was mishandled by office personnel who subsequently resigned,” and thus, the company’s president “never saw the form.” *Id.* In the case of both proposed assessments, Whibco states that it learned of them when its counsel reviewed the company’s violation history on April 24, 2006. Mot. at 2. The Secretary states that she does not oppose Whibco’s requests 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 Whibco's motions, in the interests of justice, we remand these matters to the Chief Administrative Law Judge for a determination of whether good cause exists for Whibco'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, these cases 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

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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