

CCASE:
SOL (MSHA) V. A L MILLER, MID-WISCONSIN CRUSHING
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. LAKE 95-47-M
	:	
ARTHUR L. MILLER,	:	
employed by	:	
MID-WISCONSIN CRUSHING	:	
COMPANY, INC.	:	
	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act" or "Act"). On August 18, 1994, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a notice of proposed assessment to Arthur L. Miller, employed by Mid-Wisconsin Crushing Company, Inc., which charged him with individual liability under section 110(c) of the Mine Act, 30 U.S.C. 820(c), for knowingly authorizing, ordering, or carrying out a violation of 30 C.F.R.

56.15005. On October 21, 1994, the Commission received a Petition from Fina Order, in which Miller states that, although he timely mailed a "Green Card" request for a hearing, MSHA's Civil Penalty Compliance Office informed him by letter that his card had not been timely mailed.

Section 105(a) of the Mine Act requires the Secretary of Labor to notify a party of "the civil penalty proposed to be assessed" after issuing a citation or order for an alleged violation. 30 U.S.C. 815(a). Section 105(a) allows the operator 30 days to contest the proposed penalty and further provides that, if the party fails to contest it, the assessment "shall be deemed a final order of the Commission and not subject to review by any court or agency." Id.

The Commission's procedural rules permit a party to serve a request for a hearing by first class mail. 29 C.F.R. 2700.7(c) (1993). Here, Miller contends that he timely notified the Secretary of his request by mailing the Green Card on September 26. He states that, although he gave the Green Card to his secretary on August 29, it was not mailed until September 26 due to

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his secretary's absence related to her mother's terminal illness. In its October 11, 1994, letter to Miller MSHA states that Miller's request was mailed on September 27, beyond the 30-day period, and that, accordingly, it has become a final order of the Commission.

The Commission has held that, pursuant to Fed. R. Civ. P. 60(b) ("Rule 60(b)"), it possesses jurisdiction to reopen uncontested assessments that have become final orders of the Commission under section 105(a). Jim Walter Resources, Inc., 15 FMSHRC 782, 786-89 (May 1993); see also, Rocky Hollow Coal Co., Inc., 16 FMSHRC 1931, 1932 (September 1994). Relief from a final order is available in circumstances such as a party's mistake, inadvertence, or excusable neglect.

On the basis of the present record, we are unable to evaluate the merits of Miller's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Miller timely notified the Secretary of his contest. If the judge finds that Miller timely mailed the Green Card, this case shall proceed pursuant to the Mine Act and Commission's Procedural Rules, 29 C.F.R. Part 2700. If the judge finds that Miller failed to timely mail the Green Card and that the proposed penalty became a final Commission order, the judge shall determine whether Miller has met the criteria for relief under Rule 60(b). If the judge determines that relief under Rule 60(b) is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules.

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For the foregoing reasons, this matter is remanded for assignment to a judge for consideration consistent with this order.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc L. Marks, Commissioner