

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500

May 18, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. LAKE 2003-86-M
	:	A.C. No. 33-04220-05519
MUNN ROAD SAND & GRAVEL	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY: Duffy, Chairman; Beatty, Suboleski, and Young, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On February 24, 2003, the Commission received a request made by Munn Road Sand & Gravel (“Munn Road”) 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).

The proposed penalty assessment that is the subject of this proceeding (A.C. No. 33-04220-05519) was issued on May 17, 2002. The assessment covers 11 citations issued to Munn Road by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) in early April 2002. MSHA proposed penalties totaling \$860. Munn Road’s request to reopen, originally made in a letter to MSHA that was forwarded to the Commission, was prompted by a delinquency letter from MSHA. In its request to reopen Munn Road states that it “did not receive any notice or info prior to” the proposed assessment.

The Secretary of Labor filed a response in opposition to Munn Road's request for relief. The Secretary contends that reopening is not justified by the circumstances, given the evidence that Munn Road did not claim the certified letter containing the proposed assessment when it was delivered to a post office box that MSHA verified to be Munn Road's correct address. Sec. Resp., Attachment A and Decl. of Charlene Lyles.¹

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). However, a party which refuses to accept certified mail from MSHA will most likely be unable to establish good cause. *Cf. Michigan Expediting Serv.*, 282 NLRB 210 n.6 (1986) (holding that party's failure or refusal to accept certified mail could not be used to defeat purpose of National Labor Relations Act).

¹ The Secretary subsequently reported to the Commission via letter dated March 31, 2003, that it had attempted to serve its response on Munn Road by certified letter but that it went unclaimed as well after three unsuccessful attempts at delivery.

Having reviewed Munn Road's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge. It is appropriate that an administrative law judge address the issues presented in this case, particularly the dispute raised in the Secretary's response regarding the delivery and receipt of the proposed assessment, and then determine whether good cause exists for Munn Road'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

Robert H. Beatty, Jr., Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

I would deny the operator's request for relief from the final order. The Secretary has offered evidence that Munn did not claim the certified letter with the proposed penalty assessment when it was delivered to a post office box that was verified as Munn Road's correct address. Sec. Resp. at 1-2; Attach A and Decl. of Charlene Lyles at 1-2. In fact, the Secretary states that the Postal Service made three attempts to deliver the certified letter (on May 22, 28 and June 7, 2002), and she has submitted the envelope on which the Postal Service documented these attempts. Sec. Resp. at 2; Attach. Munn Road did not rebut these allegations (although admittedly, this could well be because the Secretary's opposition containing these assertions, served on Munn Road by certified letter, also went unclaimed after three unsuccessful attempts at delivery. Letter to Richard L. Baker from Jack Powasnik, March 31, 2003).

The law is clear that when the evidence supports only one conclusion, a remand to the judge serves no purpose. *See Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (affirming judge's finding of no unwarrantable failure, despite judge's error in not addressing some of the Secretary's evidence). Here, the record compels the conclusion that Munn Road refused to accept certified mail from MSHA regarding the penalty assessment. Accordingly, I would deny the requested relief.

Mary Lu Jordan, Commissioner

Distribution

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