

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 6, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. PENN 2003-40-M
	:	A.C. No. 36-08557-05504
v.	:	
	:	Docket No. PENN 2003-41-M
	:	A.C. No. 36-08557-05505
STILLWATER ASPHALT	:	

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. (1994) (“Mine Act”).¹ On November 14, 2002, the Commission received from Stillwater Asphalt correspondence which we construe as a motion 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).

On April 19 and May 31, 2002, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued to Stillwater Asphalt two proposed penalty assessments (A.C. Nos. 36-08557-05504 and 36-08557-05505). In its motion, Stillwater Asphalt states that the company ceased operations as of December 31, 2001. Mot. No documentation was attached to

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers PENN 2003-40-M and PENN 2003-41-M, both captioned *Stillwater Asphalt* and both involving issues similar to those addressed in this order. 29 C.F.R. § 2700.12.

Stillwater Asphalt's motion. The Commission received a response from the Secretary of Labor stating that, because Stillwater Asphalt has identified no grounds for reopening the penalty assessments, she requires additional information before she can express her position on the operator's motion. Sec'y Resp. at 1-2.

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).

Stillwater Asphalt has provided no explanation for its failure to timely contest the proposed assessments. On the basis of the present record, we are thus unable to evaluate the merits of Stillwater Asphalt's position. We hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Stillwater Asphalt'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

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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