

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 19, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2004-17
v.	:	A.C. No. 36-00970-04180 A
	:	
DUANE ROSS, employed by	:	
MAPLE CREEK MINING, 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. (1994) (“Mine Act”). On November 6, 2003, the Commission received from Duane Ross, employed by Maple Creek Mining, Inc., a motion made by counsel to reopen a penalty assessment for a violation of section 110(c) of the Mine Act, 30 U.S.C. § 820(c), 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 individual charged with a violation under section 110(c) has 30 days following receipt of the Secretary of Labor’s proposed penalty assessment within which to notify the Secretary that he or she wishes to contest the proposed penalty. 30 U.S.C. § 815(a); *see also* 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a); 29 C.F.R. § 2700.27.

We have held, however, 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).

In his motion, Ross states he received a proposed penalty assessment (No. 36-00970-11102 A) which was dated October 15, 2003. Mot. at 1. He further states that on that proposed penalty assessment form there was a notation that showed an outstanding balance of \$5,500 for the subject proposed penalty assessment (No. 36-00970-04180 A). *Id.* Ross explains that he never received a copy of the subject proposed penalty assessment (No. 36-00970-04180 A), as evidenced by a certified mail receipt notice relating to the subject penalty assessment. *Id.* The receipt did not contain a signature in the space provided for the recipient’s signature. *Id.* Finally, Ross requests that, if this case is reopened, it should be consolidated with Docket No. PENN 2003-192, which he alleges involves a penalty assessment against Mr. Paul Henry arising from the same events giving rise to the subject proposed penalty assessment. *Id.* at 3. The Secretary states that she does not oppose Ross’ request for relief.

Having reviewed Ross' 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 Ross' 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, the judge shall dispose of Ross' motion to consolidate proceedings, and this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.¹

Michael F. Duffy, Chairman

Robert H. Beatty, Jr., Commissioner

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

¹ On this same date, we are separately issuing an order relating to Ross' request for relief from a final order in Docket No. PENN 2004-71 (A.C. No. 36-00970-11 102 A). If the judge grants relief in the subject proceeding and Docket No. PENN 2004-71, he shall take such action, if any, to consolidate the proceedings as he deems appropriate.

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