

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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April 5, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2004-157-M
v.	:	A.C. No. 24-02117-09474 A
	:	
JERRY LEE WILDEY, employed by	:	
STEWART EXCAVATING, 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 January 20, 2004, the Commission received from Jerry Lee Wildey, Safety Coordinator and Crusher Foreman of Stewart Excavating Inc., correspondence which we construe as a motion 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.

On September 30, 2003, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment (A.C. No. 24-02117-09474A) to Wildey. In his motion, Wildey, who is proceeding pro se, states that he was unable to determine the appropriate appeal process to challenge the assessment and that on October 19, 2003, he sent a certified letter to the MSHA Office of Assessments discussing the violations and

requesting lower penalties. Mot. at 1 & attach. Wildey states that in November 2003, he received a phone call from the Office of Assessments, which informed him that it had received his letter but could not reduce the penalties. *Id.* at 1. Wildey further asserts that he was then referred to a number of MSHA district offices and that after speaking with those offices, was again referred to the Office of Assessments where he had started in the first place. *Id.* Only then did the Office of Assessments suggest that Wildey contact the Commission for relief. *Id.* The Secretary states that she does not oppose Wildey's request 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 Wildey's 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 Wildey'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.

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Michael F. Duffy, Chairman

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Robert H. Beatty, Jr., Commissioner

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Mary Lu Jordan, Commissioner

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

Distribution

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