

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 7, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2005-104-M
v.	:	A.C. No. 05-00438-37368A
	:	
TERRY J. VANCE, employed by	:	
DICAPERL MINERALS CORP.	:	

BEFORE: Duffy, Chairman; 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. (2000) (“Mine Act”). On December 1, 2004, the Commission received from Terry J. Vance 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 and the Commission’s Procedural Rules, 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); 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 13, 2004, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment (A.C. No. 05-00438-37368A) to Vance. In his motion, Vance states the proposed assessment was sent by certified mail, return receipt requested, and it was signed for by Georgia Vance on September 25, 2004. Mot. at 2. Vance further states that, on October 12, 2004, the proposed assessment was forwarded to counsel. *Id.* Vance asserts that, on October 13, 2004, Tami Charlson, counsel’s legal assistant,

contacted MSHA's assessment office and was informed the proposed assessment was received by Vance on October 6, 2004. *Id.* Accordingly, Vance asserts, counsel filed the penalty contest on November 4, 2004. *Id.* Vance states that, on November 22, 2004, counsel received a letter from MSHA stating the penalties were not timely contested. *Id.* The affidavit of Ms. Charlson is attached to Vance's motion. Vance did not provide any other supporting documentation. The Secretary states that she does not oppose Vance'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 Vance's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Vance'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

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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