

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

November 13, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. YORK 2008-13-M
	:	A.C. No. 18-00030-117852
v.	:	
	:	
JOHN SHABRACH, employed by	:	
D.M. STOLTZFUS & SON, INC.	:	

BEFORE: Duffy, Chairman; Jordan 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 October 11, 2007, the Commission received from John Shabrach (“Shabrach”) a motion by counsel seeking to reopen a penalty assessment against Shabrach under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under the Commission’s Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 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. 29 C.F.R. § 2700.27.

In May 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) apparently issued a proposed penalty assessment to Shabrach, alleging that he was personally liable under section 110(c) of the Mine Act for an order issued to his employer, D.M. Stoltzfus & Son, Inc.¹ In his motion, Shabrach asserts that MSHA mailed the proposed penalty assessment to him at an address that was incorrect. Accordingly, Shabrach states that he never

¹ Neither party has submitted the proposed penalty assessment. Consequently, we are unable to determine exactly when the penalty assessment was issued.

received the proposed assessment form and that the first time he learned of the proposed assessment was when he received on or about September 4, 2007, a delinquency notice from MSHA dated August 13, 2007, stating that the proposed penalty assessment had become a final order of the Commission. On October 3, 2007, counsel for Shabrach sent a letter to MSHA contesting the penalty assessment. The Secretary states that she does not oppose Shabrach's request to reopen the penalty assessment.

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).

On the basis of the present record, we are unable to determine when the proposed penalty assessment was issued, to whom it was sent, and how it was addressed. We are also unable to determine from this record when Shabrach received the second notice and whether his counsel's letter of contest qualified as a timely notification to the Secretary of a contest of the proposed penalty. If counsel timely contested the proposed penalty assessment, it would not be a final order of the Commission. *See Stech, emp. by Eighty-Four Mining Co.*, 27 FMSHRC 891, 892 (Dec. 2005).

Having reviewed Shabrach's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Shabrach failed to timely contest the penalty proposal and, if so, whether good cause exists for granting relief from the final order. 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. The Chief Administrative Law Judge shall also determine whether this case should be consolidated with Docket No. YORK 2007-66-M.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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