

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

May 5, 1997

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. PENN 97-114
	:	A.C. No. 36-05018-04109 A
GARY J. KLINEFELTER	:	

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, 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) (AMine Act@). On March 25, 1997, the Commission received from Gary J. Klinefelter (AKlinefelter@) a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. ' 815(a). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Klinefelter.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. 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).

Klinefelter asserts that he did not timely submit his request for a hearing (AGreen Card@) to the Department of Labor 's Mine Safety and Health Administration (AMSHA@) because he never received a copy of the proposed penalty assessment in the period following its issuance in December 1996. Klinefelter asserts that he only received a copy of the proposed assessment on March 19, 1997, at the request of his attorney, after he received a letter from MSHA's Civil Penalty Compliance Office, dated February 26, 1997, indicating that payment of a civil penalty was delinquent. A copy of the February 26, 1997 letter is attached to Klinefelter's motion as

Exhibit C. The evidence indicates that the proposed assessment was sent by MSHA to Klinefelter at his correct home address by certified mail, and attempts were made to serve him with the proposed assessment in this manner on at least three occasions. There is no evidence as to why service by certified mail was not successful, and Klinefelter did not receive the proposed penalty assessment. Klinefelter requests the Commission to reopen this matter.

The Commission has held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), it possesses jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (September 1994).

The Commission has observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (September 1995). In accordance with Rule 60(b)(1), the Commission has previously afforded parties relief from a final order of the Commission on the basis of inadvertence or mistake. *See General Chemical Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (September 1996).

On the basis of the present record, we are unable to evaluate the merits of Klinefelter's position.¹ In the interest of justice, we remand the matter for assignment to a judge to determine whether Klinefelter has met the criteria for relief under Rule 60(b). If the judge determines that

¹ In view of the fact that the Secretary does not oppose Klinefelter's motion to reopen this matter for a hearing on the merits, Commissioner Marks concludes that the motion should be granted.

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.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen