FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 11, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-298
Petitioner	:	A. C. No. 15-02085-03741
	:	
v.	:	
	:	
PERRY COUNTY COAL CORP.,	:	
Respondent	:	Mine: EAS No. 1

ORDER DENYING MOTION TO REOPEN
ORDER TO PAY

Before: Judge Barbour

This case is before me pursuant to an order of the Commission dated October 31, 2001, remanding this matter for further consideration and determination as to whether the operator, Perry County Coal Corp. ("Perry"), is entitled to relief under Rule 60(b)(1) of the Federal Rules of Civil Procedure. [1] Rule 60(b)(1) provides relief from a final judgment in cases where there has been a "mistake, inadvertence, surprise, or excusable neglect." In the order, the Commission denies relief with respect to Citation Nos. 7467118, 7467119, and 7512809 but remands with respect to Citation No. 7497581. Subsequent to this October remand order, Perry filed a Motion to Reconsider. The Commission denied the motion in a February 19, 2002 order.

This matter arose because the operator failed to notify the Secretary that it wished to contest the proposed penalty within 30 days of receipt of the proposed penalty assessment. In its request to reopen, Perry, through counsel, asserts that it filed a notice of contest to all the citations listed above, but, through mistake or inadvertence, failed to return the "green card" to contest the civil penalties. Letter dated May 26, 2001. In its Motion to Reconsider the Commission's October 31 order, Perry contends it filed a notice of contest for Citation No. 7497581 in Docket No. KENT 2000-222-R, believing that contesting the single citation would be

[1]While the Commission is not obligated to adhere to the Federal Rules of Civil Procedure, the Commission has found guidance and has applied "so far as practicable" Rule 60(b). *See* 29 C.F.R. § 2700.1(b).

adequate to contest all four citations in addition to any subsequent proposed penalties for the citations. Mot. at 1-2.

The Commission has stated that default is a harsh remedy, and if the defaulting party makes a showing of adequate or good cause for failing to timely respond, the case may be reopened. *Coal Prep. Services, Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995). Defaulted cases have been reopened where a party appearing *pro se* has misunderstood Commission procedure. (*See Sproule Const. Co.,* FMSHRC 691, 692 (June 1999), reopened where the operator, appearing *pro se*, was not familiar with Commission procedures and failed to appreciate the significance of a Show Cause Order).

However, the present case is distinguishable from *Sproule* in that Perry has been represented by counsel at least since the filing of the notice of contest for Citation No. 7497581. Mot. Requesting Hearing, KENT 2000-222-R. Counsel could have been made aware of the need to file a notice of contest to the proposed penalty assessment through basic research or inquiry into Commission procedures. Accordingly, I find that Perry has failed to meet the criteria of Rule 60(b)(1).

Therefore, Perry's request to reopen is **DENIED**.

Perry is **ORDERED** to pay the proposed penalty assessment of $14,055.00 for all four citations.

David F. Barbour
Chief Administrative Law Judge

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