FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 27, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 2001-355-M
	:	A.C. No. 23-00458-05576
THE DOE RUN COMPANY	:	

BEFORE: Verheggen, Chairman; Jordan, Riley, and Beatty, Commissioners

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On July 17, 2001, the Commission received from the Doe Run Company ("Doe Run") 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).

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).

In its request, Doe Run, through counsel, asserts that its failure to timely submit a request for a hearing on the proposed penalty assessment to the Department of Labor's Mine Safety and Health Administration ("MSHA") was due in part to its mistake and in part to a miscommunication with MSHA. Mot. at 2. On October 10, 2000, MSHA issued Citation No. 7884600 to Doe Run. *Id.* at 1; Ex. 1 at 2. The operator contends that it requested and attended a conference on January 26, 2001, with MSHA concerning the citation. Mot. at 2. On April 23, 2001, MSHA issued a proposed penalty assessment relating to the citation. *Id.*, Ex. 1. Doe Run

asserts that, although it received the proposed penalty assessment on or about April 30, 2001, due to an internal processing mistake, the proposed assessment did not reach Dave Brown, its safety director, until June 5, 2001, almost a week after the 30-day deadline for filing a timely request for a hearing. Mot. at 2; 30 U.S.C. § 815(a). Doe Run subsequently made a request for a hearing which was received by MSHA on June 19, 2001. Mot., Ex. 2 at 1. Doe Run contends that, based on his impression from the conference with MSHA on January 26, 2001, Brown was not expecting a proposed penalty assessment to be issued until another conference with MSHA occurred after the agency issued a Tech Support report on the accident associated with the citation. Mot. at 2. Doe Run asserts that, because such an additional conference had not occurred when MSHA issued the proposed penalty assessment on April 30, 2001, Brown "did not specifically look for it." *Id.*

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also 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 Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *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. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.,* 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate the merits of Doe Run's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See, e.g.*, *Red Coach Trucking*, 23 FMSHRC 125, 125-27 (Feb. 2001) (remanding where operator failed to timely request hearing because of internal mistake and confusion about Commission procedures); *Cent. Wa. Concrete, Inc.*, 21 FMSHRC 146, 148 (Feb. 1999) (remanding where operator received penalty assessment, but such receipt was not brought to management's attention until deadline for filing green card had passed); *Ky. Stone*, 19 FMSHRC 1621, 1622-23 (Oct. 1997) (remanding where operator failed to contest penalty assessment due to its accounts payable department's internal processing error of penalty assessment). If the judge determines 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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Mary Lu Jordan, Commissioner

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Robert H. Beatty, Jr., Commissioner

Chairman Verheggen and Commissioner Riley, concurring in result:

We would grant Doe Run's request for relief here because the Secretary does not oppose it, Doe Run has offered a sufficient explanation for its failure to timely respond, and no other circumstances exist that would render a grant of relief here problematic. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether Doe Run has met the criteria for relief under Rule 60(b) of the Federal Rules of Civil Procedure. *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing the disposition from which relief has been sought).

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Theodore F. Verheggen, Chairman

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James C. Riley, Commissioner

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