

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

November 2, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 2000-1-M
	:	A.C. No. 23-01787-05542
THE DOE RUN COMPANY	:	

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

ORDER

BY: Jordan, Chairman; Marks, Riley, and Verheggen, 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 October 1, 1999, the Commission received a request from the Doe Run Company (“Doe Run”) 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). The Secretary of Labor does not oppose the motion for relief filed by Doe Run.

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).

Doe Run asserts that it intended to contest the proposed penalty associated with Citation No. 7860390 but that it did not submit a green card because it inadvertently paid the assessment along with sixteen other assessments it intended to pay, which were issued by the Department of Labor's Mine Safety and Health Administration (“MSHA”) at the same time. Mot. at 2. Doe Run asserts that it received Citation No. 7860390 on March 11, 1999, and that it filed a Notice of Contest of that citation on April 6, 1999. *Id.* at 1-2. Such contest was assigned Docket No. CENT 99-198-RM to Administrative Law Judge Gary Melick, who subsequently stayed the contest proceeding pending the issuance of the proposed penalty assessment. *Id.* at 2. On April 22, 1999, MSHA issued the proposed assessments for seventeen citations, including \$55 for

Citation No. 7860390. *Id.* Doe Run asserts that it did not submit a green card with respect to the proposed penalty for Citation No. 7860390 because the employee normally responsible for the initial review of any proposed assessment, the safety administrator, was out of the country on assignment. *Id.* at 2-3. Doe Run contends that, as a result of the apparent lack of coordination between its employees in the safety administrator's absence, it inadvertently paid the assessment for Citation No. 7860390. *Id.* Accordingly, Doe Run requests relief under Fed. R. Civ. P. 60(b). Attached to Doe Run's motion are various documents, including the proposed assessments issued by MSHA, a request for check and a copy of Doe Run's check for payment of the seventeen assessments. Exs. 1 & 2.

We have held that, in appropriate cases and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *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 Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

It appears from the record that Doe Run intended to contest the penalty related to Citation No. 7860390 and that, but for an apparent lack of coordination between the operator's personnel, Doe Run would likely have returned the green card and contested the proposed penalty assessment. While Doe Run does not deny receiving the proposed assessment, its failure to submit the green card and payment of the proposed penalty assessment can be reasonably found to qualify as "inadvertence" or "mistake" within the meaning of Rule 60(b)(1). *See Cyprus Emerald Resources Corp.*, 21 FMSHRC 592, 592-93 (June 1999) (granting motion to reopen where operator supported its allegation that it mistakenly paid proposed penalty assessment with an affidavit); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997) (granting operator's motion to reopen where operator inadvertently paid assessment because Secretary failed to send assessment to its counsel on record); *Westmoreland Coal Co.*, 11 FMSHRC 275, 276-77 (Mar. 1989) (granting operator's motion to vacate dismissal and remanding for further proceedings where operator asserted it mistakenly paid assessment); *Tug Valley Coal Processing*, 16 FMSHRC 216, 216-17 (Feb. 1994) (same).

Accordingly, in the interest of justice, we grant Doe Run's unopposed request for relief and reopen this penalty assessment that became a final order with respect to Citation No. 7860390. The 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, Commissioner

Commissioner Beatty, dissenting:

On the basis of the present record, I am unable to evaluate the merits of Doe Run's position and would remand the matter for assignment to a judge to determine whether Doe Run has met the criteria for relief under Rule 60(b). *See Tug Valley Coal Processing*, 16 FMSHRC 216 (Feb. 1994) (remanding to judge to determine whether payment of proposed penalty amounted to "genuine mistake" sufficient to reopen civil penalty proceeding); *Westmoreland Coal Co.*, 11 FMSHRC 275 (Mar. 1989) (same). I note that Doe Run has failed to provide any affidavits to support its assertion that it mistakenly paid the assessment for a citation (No. 7860390) that it intended to contest. *Compare Cyprus Emerald Resources Corp.*, 21 FMSHRC 592 (June 1999).

Robert H. Beatty, Commissioner

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