

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 24, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 2002-236-M
	:	A.C. No. 41-01371-05526
TEXAS MINING, L.P., d/b/a	:	
OGLEBAY NORTON INDUSTRIAL	:	
SANDS, INC.	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, 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) (“Mine Act”). On May 20, 2002, the Commission received from Texas Mining, L.P., d/b/a Oglebay Norton Industrial Sands, Inc. (“Oglebay”), a motion 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 unopposed motion, Oglebay, which is represented by counsel, asserts that its failure to submit a hearing request on the proposed penalty assessment to the Department of Labor’s Mine Safety and Health Administration (“MSHA”) was due to internal mishandling. Mot. at 1-4. Oglebay explains that on Decemeber 12, 2000, it was issued Citation No. 7865333 and a second

citation. *Id.* at 1, Attach. It contested both citations<sup>1</sup> and reached an agreement with the Secretary to settle both the citations and related civil penalties, even though proposed penalty assessments had not yet been issued. *Id.* at 1-2. The settlement was delayed to allow the Secretary time to assess the penalties. *Id.* at 2. On January 30, 2002, MSHA issued the proposed penalty assessment relating to Citation No. 7865333. Oglebay asserts that one of its employees inadvertently failed to send MSHA the green card contesting the proposed penalty. *Id.* Oglebay's motion is accompanied by the signed declaration of Ron Jordan, Oglebay's production director, which supports the operator's assertion that the green card was not sent due to an employee mistake. *Id.*, Attach.

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," Rule 60(b) of the Federal Rules of Civil Procedure. *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).

The record indicates that Oglebay intended to contest the proposed penalty assessment, but failed to do so due to internal mishandling. Oglebay contested the underlying citation. Moreover, the signed declaration attached to Oglebay's motion is sufficiently reliable and supports its allegations. In the circumstances presented here, we treat Oglebay's failure to file a hearing request as resulting from inadvertence or mistake. *See 46 Sand & Stone*, 23 FMSHRC 1091, 1091-93 (Oct. 2001) (granting operator's request to reopen where operator alleged its failure to timely request a hearing was due to internal mishandling as a result of change in personnel and operator's assertions were supported by affidavit); *Heartland Cement Co.*, 23 FMSHRC 1017, 1018-19 (Sept. 2001) (same).

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<sup>1</sup> Oglebay contested Citation No. 7865333 in Docket No. CENT 2001-71-R.

Accordingly, in the interest of justice, we grant Oglebay's request for relief, reopen the penalty assessment that became a final order with respect to Citation No. 7865333, and remand to the judge for further proceedings on the merits. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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Theodore F. Verheggen, Chairman

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Mary Lu Jordan, Commissioner

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Robert H. Beatty, Jr., Commissioner

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