FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 30, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	CIVIL PENALTY PROCEEDING
v.	:	Docket No. CENT 2000-447-M
	:	A.C. No. 23-02128-05506
LEO JOURNAGAN CONSTRUCTION COMPANY, INC.	: :	

BEFORE: Jordan, Chairman; Riley, Verheggen, 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 August 28, 2000, the Commission received from Leo Journagan Construction Company ("Journagan") 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). The Secretary of Labor does not oppose the motion for relief filed by Journagan.

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 motion,[1] Journagan contends that its failure to timely file a hearing request to contest the proposed penalty was due to its misplacement of the proposed assessment notification. Mot. at 2, 4. Journagan asserts that it received a substantial amount of correspondence, pleadings, and notices from MSHA around the time it received the subject proposed penalty assessment. *Id.* at 1, 4. It submits that it timely contested other proposed assessments it received then. The company mistakenly believed that it had also contested the penalty assessment at issue, and the form was filed with other documents pertaining to matters where the penalty had already been contested. Journagan explains that the green card had apparently been separated from the notice, and if it had been attached, it would have prompted the company to contest the citation. *Id.* at 2, 4. Journagan asserts that it promptly mailed the hearing request when it subsequently discovered that the request had not been filed, but that the thirty-day deadline for submission had already passed. *Id.* at 2. It contends that granting its request to reopen would not delay proceedings and that its actions amount to inadvertence or neglect under Fed. R. Civ. P. 60(b). *Id.* at 3, 5. Journagan requests that the Commission grant its request for relief and reopen the matter so that it may proceed to a hearing on the merits. *Id.* at 5.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g.*, *Jim Walters 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 Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996).

Here, the record indicates that Journagan intended to contest the proposed penalty assessment and that, but for its mistaken belief that it had already filed the proper papers, it would have timely submitted the hearing request and contested the proposed penalty assessment. Journagan has supported its allegations with a sufficiently reliable affidavit. In these circumstances, Journagan's failure to timely file a hearing request properly may be found to qualify as "inadvertence" or "mistake" within the meaning of Rule 60(b)(1). *See Kenamerican Resources, Inc.*, 20 FMSHRC 199, 200 (Mar. 1998) (reopening final order where operator failed to timely file hearing request due to internal processing error by its accounting department); *Peabody Coal Co.*, 19 FMSHRC at 1614-15 (granting operator's motion to reopen when operator failed to submit request for hearing to contest proposed penalty due to lack of coordination between counsel and personnel at mine); *Chantilly Crushed Stone, Inc.*, 22 FMSHRC 17, 19

[1] Attached to Journagan's motion is an affidavit of John A. View III, vice president of Journagan. Ex. A.

(Jan. 2000) (reopening final order where operator attached sufficiently reliable documents to support its allegations).

Accordingly, in the interest of justice, we grant Journagan's unopposed request for relief, reopen this penalty assessment that became a final order, and remand to the judge for further proceedings on the merits. 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

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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