

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

March 19, 1997

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

EASTERN ASSOCIATED COAL CORP.

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Docket No. WEVA 97-81
A.C. No. 46-01456-04119

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners¹

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) (AMine Act@). On March 4, 1997, the Commission received from Eastern Associated Coal Corp. (AEastern@) 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). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Eastern.

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).

Eastern states that it failed to submit its request for a hearing (AGreen Card@) to the Department of Labor's Mine Safety and Health Administration (AMSHA@) within 30 days

¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

following receipt because a substitute employee who was working in its mailroom temporarily failed to refer the proposed assessment to its legal department, and that the error was not discovered until almost two months later. Eastern requests the Commission to reopen this matter.

Attached as exhibits to Eastern's motion are copies of the certified mail receipt that accompanied the Proposed Assessment Form from MSHA, and affidavits from the employee in charge of its mailroom and an administrative assistant and an attorney in its legal department.

The Commission has held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), it possesses jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (September 1994).

The Commission has 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 Services, Inc.*, 17 FMSHRC 1529, 1530 (September 1995). In accordance with Rule 60(b)(1), the Commission has previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See General Chemical Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (September 1996).

On the basis of the present record, we are unable to evaluate the merits of Eastern's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Eastern has met the criteria for relief under Rule 60(b). 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.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner