

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

June 2, 1997

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. SE 97-140  
 : A.C. No. 01-01322-04075  
JIM WALTER RESOURCES, INC. :

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, 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) (AMine Act@). On May 12, 1997, the Commission received from Jim Walter Resources, Inc. (AJWR@) 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). On May 21, the Commission received the Secretary's response, opposing the request.

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).

JWR asserts that it submitted its request for hearing (AGreen Card@) 5 days late because the file for this citation was misplaced and not put on the calendar of its attorney. According to JWR, the Green Card was mailed immediately after the misplaced file was located. JWR also contends that the delay in submitting its Green Card was due to the unusually heavy case load of its attorney, which it attributes to a recent influx of citations and orders issued by MSHA and a corporate downsizing. JWR asserts that it is entitled to relief under Fed. R. Civ. P. 60(b)(1) and (6).

The Secretary argues that the request should be denied because JWR has failed to satisfy any of the requirements for obtaining relief under Fed. R. Civ. P. 60(b). S. Opp'n at 3. The Secretary asserts that the justifications offered by JWR for the late filing of its request for hearing are legally insufficient for obtaining relief under Rule 60(b). *Id.* at 3-4. Attached as exhibits to the Secretary's opposition are a signed certified mail return receipt confirming that the proposed penalty assessment was received by JWR on March 17, and a letter from the Chief of MSHA's Civil Penalty Compliance Office, dated April 25, 1997, indicating that JWR's Green Card was mailed on April 21, and received by MSHA on April 24, 1997 C 8 days after the April 16 deadline.

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). Here, as in *Rocky Hollow*, the operator alleges that the assessment has become final as the result of misplaced documents. *See Rocky Hollow*, 16 FMSHRC at 1931. *See also Eastern Associated Coal Corp.*, 19 FMSHRC 494, 494-95 (March 1997) (substitute mailroom employee failed to refer proposed assessment to legal department); *Del Rio, Inc.*, 19 FMSHRC 467, 467-68 (March 1997) (operator mailed Green Card one week late because it was inadvertently misfiled in its accounts payable file).

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 JWR's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether JWR 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.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner