

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2002-38
v.	:	A.C. No. 15-18022-03534
	:	
LEECO, 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 November 2, 2001, the Commission received from Leeco, Inc. (“Leeco”) a motion made by counsel 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. *Id.*

In its request, Leeco,¹ through counsel, asserts that the proposed penalty assessment was marked as having been received by the operator on August 21, 2001. Mot. at 1. It contends that Andy Fields, Blue Diamond's safety manager, mistakenly filed the green card past the 30-day deadline because he miscalculated the return deadline as September 21, 2001, believing that to be thirty days after the date of receipt, August 21, 2001. *Id.* at 1-2. Leeco attached to its request a signed affidavit by Fields supporting its assertion that it filed the green card past the 30-day deadline due to an inadvertent miscalculation of the required return date. *Id.*, attachment. It also attached to its request a copy of the proposed penalty assessment stamped as having been received by the operator on August 21, 2001. *Id.* In addition, it attached a copy of a delinquency letter from the Department of Labor's Mine Safety and Health Administration which states, as Leeco notes in its request, that the proposed penalty assessment was received by the operator on August 20, 2001. *Id.*

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," Fed. R. Civ. P. 60(b). *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 Leeco intended to contest the proposed penalty assessment, but that it failed to do so in a timely manner due to an internal oversight. The affidavit attached to Leeco's request is sufficiently reliable and supports its allegations.² In the circumstances presented here, we treat Leeco's late filing of a hearing request as resulting from inadvertence or

¹ Leeco states that it was operating the mine at the time the citation (Citation No. 7507813) relating to the penalty assessment was issued but that mine operations were subsequently transferred to Blue Diamond Coal Company ("Blue Diamond"), an affiliate of Leeco. Mot. at 1 n.1. On August 15, 2001, a proposed penalty assessment relating to the citation was issued to Blue Diamond, "A/K/A LEECO INC" by the Department of Labor's Mine Safety and Health Administration ("MSHA"). *Id.*, attachment.

² We note the confusion in the record over whether the operator received the proposed penalty assessment on August 20 or August 21, 2001, but determine that it does not significantly detract from the operator's allegations.

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 processing error and operator's assertions were supported by affidavit); *Heartland Cement Co.*, 23 FMSHRC 1017, 1017-19 (Sept. 2001) (same).

Accordingly, in the interest of justice, we grant Leeco's request for relief, reopen the penalty assessment that became a final order with respect to Citation No. 7507813, 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.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

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