

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

March 25, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
22.	:	Docket No. KENT 98-129
	:	A.C. No. 15-17741-03517
KENAMERICAN RESOURCES, INC.	:	

BEFORE: Jordan, Chairman; Marks, 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 March 10, 1998, the Commission received from Kenamerican Resources, Inc. (Kenamerican) 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 Kenamerican.

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 request, Kenamerican asserts that its failure to file a hearing request to contest the proposed penalty for the violation alleged in Citation No. 4278199 was due to an internal processing error made by its accounting department. According to Kenamerican, its safety director, Bobby Gibson, who normally handles challenges to citations issued by the Department of

Labor's Mine Safety and Health Administration (MSHA), was home recovering from surgery when the hearing request was due. Mot. at 2. Kenamerican asserts that Gibson provided instructions to the company's treasurer for processing the forms to contest the citation, but the accounting department inadvertently failed to process the hearing request. *Id.* at 2-3. Kenamerican alleges that Gibson discovered the processing error when he received a copy of MSHA's February 27, 1998, letter to Kenamerican's General Manager, notifying the company that the case became a final order of the Commission on December 31, 1997. *Id.* at 3.

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., Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (September 1994); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). 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 (September 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 (October 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (September 1996); *General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996).

Here, the record indicates that Kenamerican intended to contest Citation No. 4278199 and that, but for the illness of its safety director and an apparent lack of coordination between the safety director and the company's accounting department, it would have timely submitted the hearing request and contested the proposed penalty assessment. In these circumstances, Kenamerican's failure to timely file a hearing request properly may be found to qualify as **A**inadvertence^o or **A**mistake^o within the meaning of Rule 60(b)(1). *See Peabody*, 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); *Stillwater*, 19 FMSHRC at 1022-23 (granting operator's motion to reopen when operator failed to submit request for hearing to contest proposed penalty due to lack of coordination between recipient of assessment at mine and operator's attorneys).

Accordingly, in the interest of justice, we grant Kenamerican's unopposed request for relief and reopen this penalty assessment that became a final order with respect to Citation No. 4278199. 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

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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