

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

July 10, 1998

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

v.

P&P INC. OF KENTUCKY

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Docket No. KENT 98-231
A.C. No. 15-15845-03541

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) (AMine Act@). On June 12, 1998, the Commission received from P&P Inc. of Kentucky (AP&P@) a request to reopen three penalty assessments that had become final orders 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 P&P.

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).

P&P asserts that its late filing of a hearing request to contest the proposed penalties for the violations alleged in Citations Nos. 4020604, 4007060, and 4490920 was due to miscommunication between the operator and its counsel. Mot. at 1. According to P&P, the Secretary of Labor's Mine Safety and Health Administration (AMSHA@) issued 21 citations following a fatal accident at the Martiki Mine on September 19, 1997. *Id.* at 2. P&P contends that on October 30, 1997, it filed a notice to contest 19 of those citations, and that on

February 12, 1998, MSHA filed proposed assessments as to all but the three citations here at issue. *Id.* P&P asserts that it timely contested each of those proposed assessments. *Id.* P&P alleges that on March 27, it received MSHA's proposed assessments on the remaining three citations, and that on April 10, P&P forwarded a copy of this proposed assessment to its counsel. *Id.* P&P asserts that on June 3, MSHA issued it a notice indicating that the proposed assessments for those three citations had become final. *Id.* at 3. The operator submits that it and its counsel each believed the other would send the notice of contest, and, as a result, the notice of contest was not timely sent. *Id.* at 2. P&P explains that due to this misunderstanding, its hearing request was not received by MSHA until June 11 C 45 days after the 30-day deadline. *Id.* P&P asserts that it is entitled to relief under Fed. R. Civ. P. 60(b)(1) and 60(b)(6).

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 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 (Sept. 1995). 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 Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996).

The record indicates that P&P intended to contest the three citations here at issue and that, but for an apparent lack of coordination with its counsel, it likely would have timely submitted the hearing request and contested the proposed penalty assessments for these citations. In the circumstances presented here, P&P's late filing of a hearing request qualifies as inadvertence or mistake within the meaning of Rule 60(b)(1). *See Peabody*, 19 FMSHRC at 1614-15 (granting operator's motion to reopen when failure to timely submit notice of contest resulted from lack of coordination between mine and operator's counsel); *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 mining facility and its attorneys, after indicating intent to contest related citation).

Accordingly, in the interest of justice, we grant P&P's unopposed request for relief and reopen these penalty assessments that became final orders with respect to Citation Nos. 4020604, 4007060, and 4490920. The 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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