

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 22, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket No. KENT 2000-37
	:	A.C. No. 15-17741-03542
KENAMERICAN RESOURCES, INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Jordan, Chairman; Riley and Beatty, Commissioners

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 18, 1999, 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). 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 motion, Kenamerican asserts that its failure to file a hearing request to contest the proposed penalty for Citation No. 7640047 was due to a processing error made by its accounting department. Mot. at 2. The penalty assessment in question was issued to Kenamerican, along with 10 other penalty assessments for other violations. *Id.* at 1. Kenamerican alleges that while it intended to pay the penalty assessments for the 10 other violations, it intended to contest the penalty assessment for Citation No. 7640047. *Id.* Kenamerican states that its accounting department apparently sent a check in the amount of \$550 for payment of the 10 single penalty assessments, along with a hearing request to contest the penalty assessment for Citation No. 7640047, rather than separately filing the request. *Id.* Kenamerican maintains that, upon learning of this misfiling, it sent a letter dated October 28, 1999, to MSHA’s Civil Penalty

Compliance Office explaining the misfiling and requesting MSHA to accept the letter as its hearing request. Ex. B. It claims that MSHA responded by letter dated November 17, 1999, stating that it received Kenamerican's payment and hearing request on October 29, 1999, but denying the request because the penalty assessment had become a final order of the Commission on October 13.¹ Ex. C. Finally, Kenamerican states, without elaborating, that the misfiling also was due to a computer error. Mot. at 3. Kenamerican attached to its request copies of the proposed penalty assessments, the certified mail receipt, and correspondence with MSHA. Exs. A-C. Kenamerican requests that the Commission reopen the final order and allow the contest to proceed to hearing.

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., Jim Walters Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co., Inc.*, 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 Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (Sept. 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, mistake, or excusable neglect. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

¹ Kenamerican claims that MSHA received its hearing request on October 21, 1999. Mot. at 1. However, consistent with statements in MSHA's November 17 letter, the return receipt indicates that its hearing request was delivered to MSHA and signed for on October 29, 1999. Exs. A, C.

On the basis of the present record, we are unable to evaluate the merits of Kenamerican's position.² In the interest of justice, we remand the matter for assignment to a judge to determine whether Kenamerican has met the criteria for relief under Rule 60(b). *See Benton County Stone, Inc.*, 21 FMSHRC 5, 5-6 (Jan. 1999) (remanding operator's request to reopen final order where the operator's secretary internally misfiled the proposed penalties); *Del Rio, Inc.*, 19 FMSHRC 467, 467-68 (Mar. 1997) (remanding for judge's consideration operator's request to reopen penalty assessment after green card was misfiled in accounts payable file). 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

James C. Riley, Commissioner

Robert H. Beatty, Commissioner

² In view of the fact that the Secretary does not oppose Kenamerican's motion to reopen this matter for a hearing on the merits, Commissioners Marks and Verheggen conclude that the motion should be granted.

Distribution

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