

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

April 18, 2001

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) : Docket No. KENT 2001-107  
: A.C. No. 15-17646-03516  
v. :  
: :  
H & D COAL COMPANY, INC. :

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

ORDER

BY: Jordan, Chairman; Beatty, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On February 5, 2001, the Commission received from H & D Coal Company (“H & D”) 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 H & D.

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 a letter submitted by H & D’s president, Charles Hall, H & D contends that on November 7, 2000, it mailed a protest of all violations contained in the proposed penalty assessment it currently seeks to reopen. Mot. It asserts that after it contacted the compliance office of the Department of Labor’s Mine Safety and Health Administration (“MSHA”), it discovered that MSHA does not have a record of its protest. *Id.* H & D requests that the Commission grant its

request for relief and reopen the proceeding. *Id.* Attached to its request is a copy of the proposed assessment with the notations “Protested 11-7-00” and “Lynn Johnson 2-5-00.”

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).

On the basis of the present record, we are unable to evaluate the merits of H & D’s position. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See Original Sixteen to One Mine, Inc.*, 23 FMSHRC 149, 149-50 (Feb. 2001) (remanding to a judge where operator alleged that it sent a hearing request to MSHA, but MSHA did not receive the request); *Ahern & Assocs., Inc.*, 23 FMSHRC 121, 121-22 (Feb. 2001) (same). 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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Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, concurring in result:

We would grant the operator's request for relief here, because the Secretary does not oppose and the operator has offered a sufficient explanation for its failure to timely respond. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Rule 60(b). *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

Distribution

Charles B. Hall, President  
H & D Coal Company, Inc.  
Box 480  
Whitesburg, KY 41858

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd., Suite 400  
Arlington, VA 22203

Tamara Nelson, Chief  
Civil Penalty Compliance Office  
U.S. Department of Labor  
4015 Wilson Blvd., Suite 900  
Arlington, VA 22203

Chief Administrative Law Judge David Barbour  
Federal Mine Safety & Health Review Commission  
1730 K Street, N.W., Suite 600  
Washington, D.C. 20006