

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 31, 2001

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. KENT 2001-298
 :
PERRY COUNTY COAL CORPORATION :

BEFORE: Verheggen, Chairman; Jordan, Riley, 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 May 29, 2001, the Commission received from Perry County Coal Corporation (“Perry”) 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).

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, Perry, through counsel, asserts that its failure to timely submit a request for a hearing on the proposed penalty assessment to the Department of Labor’s Mine Safety and Health Administration (“MSHA”) was due to its mistake or inadvertence. Mot. It contends that it had filed Notices of Contest challenging the four citations (Citation Nos. 7497581, 7467118, 7467119, and 7512809) associated with the proposed penalty assessment. *Id.* Although the operator does not explain the circumstances leading to its mistake or inadvertence, Perry requests that the Commission reopen this matter. *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).

First, although counsel for Perry states that Notices of Contest were filed for Citation Nos. 7467118, 7467119, and 7512809, and relies upon these purported Notices of Contest in seeking relief here, no such contests have been docketed. Perry has thus offered no explanation for its failure to contest the penalties for these citations. Accordingly, we deny relief as to these penalties.

It is a matter of record, however, that Perry contested Citation No. 7497581. Docket No. KENT 2000-222-R. But on the basis of the present record we are unable to evaluate the merits of Perry's request for relief relating to the penalty for this citation. In the interest of justice, we remand the penalty proceeding relating to Citation No. 7497581 for assignment to a judge to determine whether relief from the final order is appropriate. *See Bailey Sand & Gravel Co.*, 20 FMSHRC 946, 946-47 (Sept. 1998) (remanding to judge where operator offered no explanation for its failure to contest the proposed penalty assessment); *Rivco Dredging Corp.*, 10 FMSHRC 624, 624-25 (May 1988) (remanding where operator was apparently unaware of the requirement to separately file notice of contest of citations and notice contesting proposed penalty assessment). If the judge determines that such relief is appropriate, the penalty proceeding for Citation No. 7497581 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

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

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