FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 2, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 98-194-M
NATIONAL LIME & STONE, 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) (AMine Act@). On August 13, 1998, the Commission received from National Lime & Stone, Inc., (ANational@) 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.

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).

National submits that, although it timely filed a notice to contest Citation No. 7821909, it failed to timely file a hearing request to contest the associated penalty proposed by the Department of Labor=s Mine Safety and Health Administration (AMSHA@). It explains that its late filing of the hearing request was due to a misunderstanding between counsels for National and the Secretary concerning the need to separately contest the citation and the proposed penalty. Mot. at 3. National claims that it timely filed a notice of contest of the citation on April 7, 1998, and one week later requested expedited consideration of the contest case, which had been assigned to Administrative Law Judge August Cetti. *Id.* at 2. The operator contends that soon thereafter, the parties reached a settlement regarding the penalty amount, which was then reduced to a written

settlement agreement. *Id.* Subsequently, the parties requested and received a stay of the proceedings pending assessment of civil penalties. *Id.* National claims that on June 9, MSHA filed a petition proposing a penalty for the citation. *Id.* The operator asserts that the settlement addressed both the proposed penalty and the citation, and that the settlement Awas filed with the Court for approval on July 2, 1998.@ *Id.* National contends that it believed that, because the parties had agreed to a penalty amount and agreed to move for entry of the settlement, no Agreen card@ needed to be sent, and no separate docket challenging the proposed penalty assessment had to be established. *Id.*

National states that on or about July 13, 1998, the judge notified the Solicitor=s office that he could not approve the parties= settlement agreement because a separate action challenging the proposed assessment had not been instituted. *Id.* Subsequently, National filed its Agreen card@ contesting the assessment, but MSHA rejected the petition as untimely because it was sent over 30 days after the proposed assessment had issued. *Id.* National asserts that its failure to file the Agreen card@ in a timely fashion was due to mistake or inadvertence, and that it is entitled to relief under Fed. R. Civ. P. 60(b)(1). *Id.* at 5.

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 also have 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).

National=s motion indicates that it intended to contest Citation No. 7821909 and settle the related penalty with the Secretary, and that, but for an apparent mutual misunderstanding between counsel regarding the necessity of challenging the penalty assessment prior to approval of the settlement, National likely would have contested the proposed penalty. In the circumstances presented here, National=s late filing of a hearing request amounts to inadvertence or mistake within the meaning of Rule 60(b)(1). *See 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); *Rivco Dredging Corp.*, 10 FMSHRC 624, 624-25 (May 1988) (granting operator=s petition for review when operator filed notice of contest as to alleged violations, but was unaware that contest of civil penalty proposals was required).

Accordingly, in the interest of justice, we grant National=s unopposed request for relief and reopen this penalty assessment that became a final order with respect to Citation No. 7821909. 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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