

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 30, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. PENN 2001-171
	:	A.C. No. 36-00958-04286
EIGHTY FOUR MINING COMPANY	:	

BEFORE: Verheggen, Chairman; Jordan, and Riley, Commissioners¹

ORDER

BY: Verheggen, Chairman; and Riley, 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 July 16, 2001, the Commission received from Eighty Four Mining Company (“Eighty Four”) 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 Eighty Four’s request 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).

In its request, Eighty Four states that on February 22, 2001, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued to Eighty Four a proposed penalty assessment of \$4867 for nineteen alleged violations. Mot. The operator maintains that it indicated on the proposed assessment form (“green card”) its intent to contest the penalties related to four of the citations listed in the penalty proposal, Citation Nos. 07043597, 07045701,

¹ Commissioner Beatty recused himself from this matter and took no part in its consideration.

07078929, and 07076765, which amounted to \$1647. *Id.* Eighty Four states that on March 12, 2001, it paid proposed penalties in the sum of \$3220 for the remaining fifteen citations that it did not contest. *Id.* It submits that on May 23, 2001, MSHA issued a letter demanding payment for the penalties associated with Citation Nos. 07043597, 07045701, 07078929, and 07076765. *Id.* Eighty Four states that it was subsequently advised by MSHA's Office of Assessments that MSHA had not received the green card contesting the four subject proposed penalties. *Id.* Eighty Four submits that it has since resolved the issues involving Citations Nos. 07078929, and 07076765, but that it wishes to continue its contest of Citations Nos. 07043597 and 07045701. *Id.* Attached to the motion is a copy of the green card indicating the operator's intent to contest the subject proposed civil penalties.

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).

Eighty Four has offered a sufficient explanation demonstrating that it intended to contest Citation Nos. 07043597 and 07045701 and any related civil penalties, and that the proposed penalty assessment as to those citations became final as a result of “inadvertence” or “mistake.” The operator’s intention to contest these two citations is clearly apparent from the undisputed fact that Eighty Four paid the penalties proposed by MSHA for all but the citations it wished to contest. We also note that the Secretary does not oppose Eighty Four’s request. In addition, no other circumstances exist that would render a grant of relief here problematic. Accordingly, in the interest of justice, we grant Eighty Four’s unopposed request for relief to reopen the penalty assessment that became a final order with respect to Citation Nos. 07043597 and 07045701. This case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

Commissioner Jordan, dissenting:

Although the majority may have correctly inferred that Eighty Four intended to contest the two citations at issue and their related civil penalties, slip op. at 3, it does not address the relevant question here, which is why MSHA never received the appropriate request for a hearing (or a “green card”). Eighty Four provides no explanation, and does not even assert that it ever mailed the hearing request. Rather, in its submission to the Commission (which, I note, is not in the form of a sworn statement) it simply claims that it is “at a loss to explain the missing ‘green card.’” Mot.

In the absence of any proffered rationale whatsoever,² I am reluctant to grant relief, and would remand the matter for assignment to a judge to determine whether Eighty Four has met the criteria for relief under Rule 60(b). *See H & D Coal Co.*, 23 FMSHRC 382 (Apr. 2001) (remanding to a judge where operator alleged that it sent a hearing request to MSHA but MSHA did not receive it); *Original Sixteen to One Mine, Inc.*, 23 FMSHRC 149, 149-50 (Feb. 2001) (same); *Ahern & Assocs., Inc.*, 23 FMSHRC 121, 121-22 (Feb. 2001) (same). Accordingly, I respectfully dissent.

Mary Lu Jordan, Commissioner

² I recognize that the operator is appearing pro se, but believe this should not absolve it from supplying some justification as to why MSHA never received the green card.

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