

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 23, 2002

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | Docket No. PENN 2002-164-M |
| | : | A.C. No. 36-00251-05501 B157 |
| v. | : | |
| | : | Docket No. PENN 2002-165-M |
| | : | A.C. No. 36-08599-05501 B157 |
| J.P. DONMOYER, INC. | : | |

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On July 10, 2002, the Commission received from J.P. Donmoyer, Inc. (“Donmoyer”) two motions filed by counsel to reopen penalty assessments that had become final orders 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. *Id.*

As a threshold matter, in the interests of judicial economy, we hereby order the consolidation of these two proceedings, Docket Nos. PENN 2002-164-M (A.C. No. 36-00251-05501 B157) and PENN 2002-165-M (A.C. No. 36-08599-05501 B157). 29 C.F.R. § 2700.12 (“The Commission . . . may at any time, upon [its] own motion . . . order the consolidation of proceedings that involve similar issues.”). The discussion below applies to both dockets.

In its motions, which are similar in all respects except the actual assessments at issue, Donmoyer asserts that in early 2002, it received several proposed penalties from the Department

of Labor's Mine Safety and Health Administration ("MSHA"). Mot. at 1. The operator contends that its safety director, Ken Kunes, did not understand the procedures he needed to follow to challenge penalties proposed by MSHA. *Id.* at 2. As a result, Kunes "returned the green card for only one of the proposed penalties . . . apparently under the mistaken impression that doing so was sufficient to contest all of the penalties for all of the citations that were pending." *Id.* Donmoyer attached to its motions a signed affidavit by James M. Kretz, the operator's controller. *Id.* at Attach. A.

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," Rule 60(b) of the Federal Rules of Civil Procedure. *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).

The record indicates that Donmoyer intended to contest the proposed penalty assessments, but that it failed to do so in a timely manner due to internal processing errors that resulted from unfamiliarity with Commission procedure. The affidavit attached to Donmoyer's motions is sufficiently reliable and supports its allegations. Thus, Donmoyer's failure to timely request hearings in these matters resulted from inadvertence or mistake. *See, e.g., Leeco, Inc.*, 24 FMSHRC 338, 339-40 (Apr. 2002) (granting operator's request to reopen where operator alleged its failure to timely request a hearing was due to internal processing error and operator's assertions were supported by affidavit); *Harriman Coal Corp.*, 23 FMSHRC 153, 154-55 (Feb. 2001) (reopening case that went final due to operator's unfamiliarity with Commission procedure and operator's assertions were supported by affidavit).

Accordingly, in the interest of justice, we grant both of Donmoyer's motions to reopen, reopen the penalty assessments that became final orders, and remand to the Chief Administrative Law Judge for further proceedings on the merits. The case 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

Robert H. Beatty, Jr., Commissioner

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