

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

October 9, 1997

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. KENT 97-342  
 : A.C. No. 15-14074-03711  
PEABODY COAL COMPANY :

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, 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 September 18, 1997, the Commission received from Peabody Coal Company (APeabody@) 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 filed by Peabody.

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).

Peabody asserts that its late filing of a hearing request to contest the proposed penalty for the violation alleged in Citation No. 4067695 was due to a misunderstanding concerning the need to separately contest the proposed penalty. According to Peabody, on April 10, 1997 it timely filed a Notice of Contest with respect to the violation alleged in Citation No. 4067695. Mot. at 2; Ex. B. Peabody contends that following its receipt of the proposed penalty assessment on June 30, its counsel sent a copy of the assessment to the mine for review, in accordance with its internal

procedures, and advised the mine that a notice of contest had already been filed. Mot. at 2. Peabody's counsel, however, did not specifically advise the mine that it was necessary to separately contest the penalty proposed with respect to Citation No. 4067695. *Id.* Peabody claims that, as a result, the mine retained control of a vital internal form until August 1, when its counsel immediately completed and mailed the hearing request concerning the proposed assessment. *Id.* at 3. Peabody asserts that due to these events, its hearing request was not received by MSHA until August 5 C six days after the 30-day deadline. *Id.* Peabody asserts that it is entitled to relief under Fed. R. Civ. P. 60(b)(1) and (6).

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). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (September 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 Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (September 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 General Chemical Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (September 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

The record indicates that Peabody intended to contest Citation No. 4067695 and any related penalty and that, but for an apparent lack of coordination between its counsel and personnel at the mine, Peabody likely would have timely submitted the hearing request and contested the proposed penalty assessment for this citation. In the circumstances presented here, Peabody's late filing of a hearing request properly could be found to qualify as 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, after indicating intent to contest related citation); *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 Peabody's unopposed request for relief and reopen this penalty assessment that became a final order with respect to Citation No. 4067695. The 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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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner