FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

June 5, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 2001-85
	:	A.C. No. 36-06990-03527
HARRIMAN COAL CORPORATION	:	

BEFORE: Jordan, Chairman; 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) ("Mine Act"). On March 2, 2001, the Commission received from Harriman Coal Corporation ("Harriman") 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 Harriman's 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).

In its motion, Harriman, through counsel, asserts that the late filing of its hearing request to contest the proposed penalty assessment associated with Order No. 7002182 was due to unfamiliarity with Commission rules and procedure. Mot. at 2, 4-5. Harriman contends that on August 26, 1999, MSHA issued Order No. 7002182, which was a follow-up order to Order No. 7000506.[1] *Id.* at 2. Harriman maintains that on May 18, 2000, it received the proposed penalty

[1] MSHA issued Order No. 7000506 to Harriman on July 15, 1999, and sent the associated proposed penalty assessment on May 4, 2000. *See* Ex. B. On August 7, after

assessment associated with Order No. 7002182. *Id.* at 1-2. It asserts that, like the proposed penalty assessment it received for Order No. 7000506, it understood that the proposed assessment became final after 30 days, but did not understand that the final order would be non-appealable. *Id.* at 2. Harriman contends that on the same date that the Commission issued its order reopening the proposed assessment for Order No. 7000506, it received a notice that MSHA would undertake collection actions for nonpayment of the proposed assessment for Order No. 7002182. *Id.* at 2-3. Harriman maintains that it understood that the filing of the Petition to Reopen the proposed assessment for the underlying order (Order No. 7000506) would temporarily suspend collection actions on any proposed assessments that flow directly from that order. *Id.* at 3. It claims that it wishes to challenge the merits of the underlying order and any order that is based upon the underlying order, including Order No. 7002182. *Id.* Harriman requests relief under Fed. R. Civ. P. 60(b)(1). *Id.* at 3-4.[2]

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 Nat'l Lime & Stone Co., Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

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receiving notice that the penalty assessment had become a final Commission order due to Harriman's failure to contest it, Harriman filed a petition to reopen that final order. Mot. at 2-3; *see* Ex. A. On February 12, 2001, the Commission issued an order granting Harriman's request in Docket No. PENN 2000-203. 23 FMSHRC 153, 155 (Feb. 2001).

[2] Attached to its motion is a copy of its Petition to Reopen Penalty Assessment with attachments filed in Docket No. PENN 2000-203. Ex. A. Harriman also attached a copy of Order No. 7002182 (Ex. B); the proposed assessment for Order No. 7002182 (Ex. C); MSHA's collection notice for nonpayment of the proposed assessment associated with Order No. 7002182 (Ex. D); the Commission's February 12 order reopening the proposed assessment in Docket No. PENN 2000-203 (Ex. E); and a Notice of Contest for filing, in the event the Commission grants its request to reopen the proposed assessment associated with Order No. 7002182 (Ex. F).

On the basis of the present record, we are unable to evaluate the merits of Harriman's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See Eclipse C Corp.*, 23 FMSHRC 134, 135 (Feb. 2001) (remanding to a judge where operator filed notice of contest in one proceeding and mistakenly believed that contest applied to other proceedings it received at the same time); *Upper Valley Materials*, 23 FMSHRC 130, 131 (Feb. 2001) (remanding to a judge where operator failed to file hearing request due to lack of familiarity with Commission procedure). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, concurring in result:

This is the second incident in which Harriman's counsel has filed a request to reopen on the basis that it misunderstood the Commission's Procedural Rules. The Commission's forbearance for such mistakes is not without limitation. Nevertheless, we would grant the operator's request for relief here because the Secretary does not oppose it, and because we find no other circumstances exist that would render such a grant problematic. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Rule 60(b). *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

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