



*Id.* It states that, on April 30, 1999, the administrative law judge assigned to the contest proceeding issued a show cause order “which suggested that [Cyprus] should move to reopen the penalty assessment if it desired to continue its contest of the citation.” *Id.* at 3. It contends that its payment constitutes “mistake” under Fed. R. Civ. P. 60(b), and requests that the Commission reopen the proposed penalty assessment. *Id.* at 3-4. Cyprus attached to its motion, among other documents, the affidavit of Cyprus’s Safety Manager, which provides that payment of the penalty was a mistake. Ex. 1.

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-90 (May 1993). 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 Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

It appears from the record that Cyprus intended to contest the penalty related to Citation No. 7013288 and that, but for an oversight by the operator, it would likely have returned the green card and contested the proposed penalty assessment. While Cyprus does not deny receiving the proposed assessment, its failure to submit the green card and payment of the proposed assessment can be reasonably found to qualify as “inadvertence” or “mistake” within the meaning of Rule 60(b)(1). *See Stillwater Mining Co.*, 19 FMSHRC 1021, 1023 (June 1997) (holding that failure by Secretary to send the proposed penalty assessment to operator’s counsel and payment by operator amounted to mistake sufficient to reopen penalty).

Accordingly, in the interest of justice, we grant Cyprus's unopposed request for relief and reopen the penalty assessment that became a final order with respect to Citation No. 7013288. This 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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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

Commissioner Marks and Commissioner Beatty, dissenting:

On the basis of the present record, we are unable to evaluate the merits of Cyprus's position and would remand the matter for assignment to a judge to determine whether Cyprus has met the criteria for relief under Rule 60(b). *See Tug Valley Coal Processing*, 16 FMSHRC 216, 217 (Feb. 1994) (remanding to judge to determine whether payment of proposed penalty assessment amounted to mistake sufficient to reopen the penalty).

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Marc Lincoln Marks, Commissioner

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Robert H. Beatty, Jr., Commissioner

Distribution

R. Henry Moore, Esq.  
Buchanan Ingersoll  
One Oxford Centre  
301 Grant St., 20<sup>th</sup> Floor  
Pittsburgh, PA 15219-1410

Andrea J. Appel, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
Gateway Bldg., Rm. 14480  
3535 Market St.  
Philadelphia, PA 19104

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd., Suite 400  
Arlington, VA 22203

Chief Administrative Law Judge Paul Merlin  
Federal Mine Safety and Health Review Commission  
1730 K Street, N.W., Suite 600  
Washington, D.C. 20006