## FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 21, 1999

SECRETARY OF LABOR, : MINE SAFETY AND HEALTH : ADMINISTRATION (MSHA) :

:

v. : Docket No. PENN 99-201

A.C. No. 36-05466-04136

CYPRUS EMERALD

RESOURCES CORPORATION :

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

## ORDER

BY: Jordan, Chairman; Riley, and Verheggen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On May 18, 1999, the Commission received from Cyprus Emerald Resources Corporation ("Cyprus") 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 the motion for relief filed by Cyprus.

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, Cyprus maintains that it failed to timely file a request for a hearing ("green card") for the proposed penalty associated with Citation No. 7013288 because the proposed penalty was accidentally paid. Mot. at 1-2. The operator submits that it timely filed a notice of contest of the citation, and that the contest proceeding was stayed pending initiation of the associated civil penalty proceeding. *Id.* at 2. Cyprus states that, on March 1, 1999, the proposed assessment for the citation was issued along with other proposed penalties for citations that Cyprus did not intend to contest and that, on March 29, the subject penalty was mistakenly paid.

*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).

reopen the penalty assessment that became a	e, we grant Cyprus's unopposed request for relief and a final order with respect to Citation No. 7013288. e Act and the Commission's Procedural Rules, 29
	Mary Lu Jordan, Chairman
	James C. Riley, Commissioner
	Theodore F. Verheggen, Commissioner

Commissioner Marks and Commissioner Beatty, dissenting
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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).

Marc Lincoln Marks,	Commissioner

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