

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

August 16, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. PENN 99-218
	:	A.C. No. 36-00958-04210
EIGHTY FOUR MINING COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners<sup>1</sup>

ORDER

BY: Jordan, Chairman; Marks, 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 June 7, 1999, the Commission received from Eighty Four Mining Company (“Eighty Four”) a Motion for Leave to File a Notice of Contest of Proposed Penalty Assessment out of time for three 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). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Eighty Four.

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 request, Eighty Four contends that it timely filed a hearing request to contest the proposed penalties related to Citation Nos. 3658055, 3658059, and 3658060. Mot. at 1-2. Eighty Four states that it received the proposed penalty assessments for nineteen citations on

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<sup>1</sup> Commissioner Beatty recused himself from this matter and took no part in its consideration.

March 1, 1999. *Id.* at 1. The operator maintains that it indicated on the proposed assessment (“green card”) that it mailed to the Department of Labor’s Mine Safety and Health Administration (“MSHA”) that it intended to contest the penalties related to Citation Nos. 3658055, 3658059, and 3658060, which totaled \$770.00, and that it intended to pay the penalties related to the remainder of the citations, which totaled \$2652.00. *Id.* at 1-2. Eighty Four paid the \$2652.00 in proposed penalties related to the citations it did not contest. *Id.* at 1. The operator subsequently received a notice from MSHA stating that \$770.00 in civil penalties was overdue and assessing additional charges of \$10.47. *Id.* at 2. Eighty Four then telephoned MSHA’s Office of Assessments, which advised the operator that it had not received the green card contesting the three subject proposed penalties. *Id.* By that time, however, the thirty-day deadline for submission of the request had already passed. Eighty Four believes that it timely mailed the green card and cannot explain why MSHA did not receive it. *Id.* at 2. Attached to the motion is a copy of the green card indicating the operator’s intent to contest the subject proposed civil penalties, a Notice of Contest of Proposed Penalty Assessment for Citation Nos. 3658055, 3658059, and 3658060, and copies of the citations here at issue.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g., Essayons, Inc.*, 20 FMSHRC 786, 788 (Aug. 1998) (remanding final order when operator misplaced proposed penalty notification); *Del Rio, Inc.*, 19 FMSHRC 467, 468 (Mar. 1997) (remanding final order when operator inadvertently misfiled hearing request card); *RB Coal Co.*, 17 FMSHRC 1110, 1111 (July 1995) (remanding final order when operator misplaced hearing request card). 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 Western Aggregates, Inc.*, 20 FMSHRC 745, 746-47 (July 1998) (remanding request to reopen penalty assessment where operator inadvertently sent request for hearing to MSHA’s payment lockbox); *Drummond Co.*, 17 FMSHRC 883, 884 (June 1995) (remanding request to reopen penalty assessment after hearing request was timely submitted but erroneously indicated that the operator did not wish to contest certain proposed penalties).

Here, the green card copy attached to the motion shows that the operator wrote an “x” next to the listings for Citation Nos. 3658055, 3658059, and 3658060. Handwriting on the bottom of the green card copy states “Appeal \$777.00” — the total amount for the proposed penalties for Citation Nos. 3658055, 3658059, and 3658060, and “Pay \$2652.00.” It is uncontroverted that MSHA received payment of \$2652.00, an amount equal to the total civil penalties proposed by the Secretary less \$777.00. While it is not clear why MSHA did not receive the green card, the record demonstrates the operator’s intent to contest the subject proposed penalties. Eighty Four’s failure to submit the green card can be reasonably found to

qualify as “inadvertence” or “mistake” within the meaning of Rule 60(b)(1). *See Kenamerican Resources, Inc.*, 20 FMSHRC 199, 200-01 (Mar. 1998) (reopening proceedings when green card was not timely filed due to operator’s internal processing error).

Accordingly, the interest of justice, we grant Eighty Four’s unopposed request for relief and reopen the penalty assessments that became final orders with respect to Citation Nos. 3658055, 3658059, and 3658060. 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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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

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