

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 10, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2002-50
v.	:	A.C. No. 36-08862-03509
	:	
ROSEBUD MINING COMPANY	:	

BEFORE: Verheggen, Chairman; Jordan 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 January 8, 2002, the Commission received from Rosebud Mining Company (“Rosebud”) 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).

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, Rosebud, through counsel, indicates that on August 30, 2001, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued to Rosebud a proposed penalty assessment totaling \$553 for seven alleged violations. Mot., Attach. Rosebud asserts that it did not contest four of the citations and paid their penalties to MSHA, but that it filed a proposed assessment form (“green card”) signed by counsel for the operator on September 25, 2001, contesting the penalties for the remaining three citations. *Id.* Apparently, however, MSHA did not receive the green card. *Id.* Attached to Rosebud’s request is a copy of the green

card which indicates that the company intended to contest the penalties (totaling \$291) for three of the listed citations (Citation Nos. 07060863, 07060868, and 07060869). *Id.*, Attach.

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,” Rule 60(b) of the Federal Rules of Civil Procedure. *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 Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

Rosebud has offered a sufficient explanation demonstrating that it intended to contest the penalties relating to Citation Nos. 07060863, 07060868, and 07060869, and that the proposed penalty assessment as to those citations became final as a result of “inadvertence” or “mistake.” *See Eighty Four Mining Co.*, 23 FMSHRC 1102, 1102-04 (Oct. 2001) (granting relief where operator paid some of the penalties and allegedly submitted green card contesting the other penalties but MSHA did not receive the green card); *Eighty Four Mining Co.*, 21 FMSHRC 876, 876-78 (Aug. 1999) (same). Rosebud’s intention to contest these penalties is supported by the copy of the green card, signed and dated by counsel, attached to its request, and by its uncontested assertion that it paid the remaining uncontested penalties. In addition, no other circumstances exist that would render a grant of relief here problematic.

Accordingly, in the interest of justice, we grant Rosebud's unopposed request for relief to reopen the penalty assessment that became a final order with respect to Citation Nos. 07060863, 07060868, and 07060869. We remand to the Chief Administrative Law Judge for further proceedings on the merits. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

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