

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

June 9, 1997

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEST 97-179-M
 : A.C. No. 24-01490-05583
STILLWATER MINING COMPANY :

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, 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) (AMine Act@). On May 16, 1997, the Commission received from Stillwater Mining Company (AStillwater@) 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). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Stillwater.

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).

Stillwater asserts that it intended to contest this citation and the related penalty but did not submit a request for hearing (AGreen Card@) because the assessment was sent by MSHA to the company directly at its mining site, rather than to its attorneys of record. Stillwater contends that after receiving Citation No. 7900016 on May 24, 1996, it notified the Secretary on June 13, 1996, through its attorneys, that it intended to contest the citation and any Aproposed penalty assessments related to [that] citation.@ Mot. at 1-2 & Attach. 2. Stillwater=s attorneys entered their appearance in the contest proceeding (Docket No. WEST 96-281-RM), and requested that

future correspondence, pleadings, communications, and proposed penalties concerning this matter . . . be directed to their attention. Mot. at 2 & Attach. 2. On April 28, 1997, more than eight months after Administrative Law Judge Richard W. Manning entered an order staying further proceedings in the case until the Secretary filed a related civil penalty proceeding, counsel for the Secretary indicated that MSHA's Office of Assessments had advised him that a proposed penalty assessment for eleven citations (including Citation No. 7900016) had been issued on October 10, 1996, assessing a total penalty of \$550 (\$50 for Citation No. 7900016), and that payment for all the citations had been received by November 7, 1996. Mot. at 2-4 & Attachs. 3, 9, 10. Stillwater asserts that, despite the request in its notice of contest to communicate directly with its counsel of record, MSHA instead mailed this proposed penalty assessment to it directly at the mine site. Mot. at 4. Stillwater contends that, as a result, it unknowingly paid the assessment of \$550 for the eleven violations, including a \$50 penalty for Citation No. 7900016, despite its intention to contest this citation and any related penalty. *Id.* at 5. Attached to Stillwater's motion are various documents and correspondence relating to the underlying proceeding involving its contest of Citation No. 7900016, which indicate that Stillwater intended to contest the citation and any related penalty assessment. Stillwater asserts that it is entitled to relief under Rule 60(b)(1), (3), and (6) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 60(b)(1), (3), and (6).

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (September 1994). We have also noted 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 Services, Inc.*, 17 FMSHRC 1529, 1530 (September 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 General Chemical Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (September 1996).

It appears from the record that Stillwater intended to contest this citation and any related penalty and that, but for an apparent lack of coordination between the recipient of the proposed penalty assessment at its mining facility and its attorneys, it would likely have returned the Green Card and contested this proposed penalty assessment. While Stillwater does not deny receiving the proposed assessment sent by MSHA to the mine site, in the circumstances presented here (in particular, the Secretary's failure to send the penalty assessment to Stillwater's counsel, despite their explicit request), its failure to submit the request for hearing as to this particular penalty assessment, 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 Westmoreland Coal Co.*, 11 FMSHRC 275, 276 (March 1989) (operator asserted that penalty had been paid in error); *Tug Valley Coal Processing*, 16 FMSHRC 216, 216-17 (February 1994) (same); *Drummond Co.*, 17 FMSHRC 883, 883-84 (June 1985) (operator mistakenly circled on Green Card the citations and

orders it was not contesting rather than those it wished to contest); *Rivco Dredging Corp.*, 10 FMSHRC 624, 624-25 (May 1988) (operator filed notice of contest as to alleged violations, but was unaware that contest of civil penalty proposals was also required). Accordingly, in the interest of justice, we grant Stillwater's unopposed request for relief and reopen this penalty assessment that became a final order with respect to Citation No. 7900016. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner