

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 10, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2002-404-M
v.	:	A.C. No. 04-05476-05507
	:	
CDG MATERIALS, INC.	:	

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 June 3, 2002, the Commission received from CDG Materials, Inc. (“CDG”) 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, CDG asserts that it timely mailed a request for a hearing to the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to contest the proposed penalty assessment but that, “[d]ue to current events,” its delivery may have been delayed because of “a lack in efficiency of the postal service.” Mot. It attached to its request a copy of the proposed penalty assessment issued on November 9, 2001. *Id.*, Attach. On June 18, 2002, the Secretary filed a response asserting that CDG received the proposed penalty assessment on November 29, 2001, but did not mail its hearing request to MSHA until January 4, 2002, after the 30-day deadline for mailing the request had passed. Sec’y Resp. at 1 n.1; *see* 29 C.F.R. § 2700.26. The Secretary attached to her response a copy of a certified mail receipt indicating that CDG received the proposed penalty assessment on November 29, 2001. Sec’y Resp., Attach. She did not include any documents supporting her allegation that CDG mailed its hearing request on January 4, 2002.

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).

On the basis of the present record, we are unable to evaluate the merits of CDG’s position. The record contains no documentation to support CDG’s allegation that it timely mailed its hearing request, or the Secretary’s contrary assertion that CDG failed to timely mail its request. Accordingly, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See CDG Materials, Inc.*, 24 FMSHRC 419, 419-21 (May 2002) (remanding to judge where operator alleged it timely mailed hearing request, but its delivery to MSHA was late due to postal delays resulting from September 11 events); *H & D Coal Co., Inc.*, 23 FMSHRC 382, 383 (Apr. 2001) (remanding to judge where operator allegedly mailed hearing request, but MSHA did not receive it). If the judge determines that such relief is appropriate, this 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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