

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 2002-58-M
	:	A.C. No. 02-02479-05535
KILAUEA CRUSHER, 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 November 21, 2001, the Commission received from Kilauea Crusher, Inc. (“Kilauea”) 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 Kilauea’s request for relief.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary’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 the request, Kilauea, which is represented by counsel, asserts that its failure to timely submit a hearing request on the proposed penalty assessment to the Department of Labor’s Mine Safety and Health Administration (“MSHA”) was due to internal mishandling. Mot. at 1-3. Kilauea explains that it received four citations during an inspection conducted on November 21, 2000, and subsequently received two proposed penalty assessments for these citations, the first proposed assessment for Citation No. 7947469, at issue in this proceeding, on August 30, 2001,

and the second proposed assessment for Citation Nos. 7947470 through 7947472 on September 8, 2001. *Id.* at 2. The operator contends that its vice-president, Marcilline Nichols, date-stamped the second assessment September 8, 2001, stapled both assessments together, and on September 10, 2001, handed them to its counsel to file a hearing request. *Id.* The operator contends that because Nichols failed to date-stamp the first proposed assessment for Citation No. 7947469, its counsel mistakenly believed that it received both assessments on the same date and filed hearing requests for both assessments on October 2, 2001. *Id.* at 2-3. It claims that it was not aware that its hearing request on the assessment for Citation No. 7947469 was late until it received a letter from MSHA informing it that the proposed assessment had become a final order. *Id.* The operator requests that the Commission reopen the assessment and permit it to have a hearing on the merits. *Id.* at 5. The operator attached to its request a copy of the proposed penalty assessment for Citation No. 7947469, copies of the citations, and the affidavit of Marcilline Nichols.

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,” Fed. R. Civ. P. 60(b). *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).

The record indicates that Kilauea intended to contest the proposed penalty assessment, but that it failed to do so in a timely manner due to internal mishandling. The affidavit attached to Kilauea’s request is sufficiently reliable and supports its allegations. In the circumstances presented here, we treat Kilauea’s late filing of a hearing request as resulting from inadvertence or mistake. *See 46 Sand & Stone*, 23 FMSHRC 1091, 1091-93 (Oct. 2001) (granting operator’s request to reopen where operator alleged its failure to timely request a hearing was due to internal mishandling as a result of change in personnel and operator’s assertions were supported by affidavit); *Heartland Cement Co.*, 23 FMSHRC 1017, 1018-19 (Sept. 2001) (granting operator’s request to reopen where operator alleged its failure to timely request a hearing was due to internal processing error as a result of its receipt of numerous proposed penalty assessments simultaneously and operator’s allegations were supported by affidavit).

Accordingly, in the interest of justice, we grant Kilauea's request for relief, reopen the penalty assessment that became a final order with respect to Citation No. 7947469, and remand to the 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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