

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

July 28, 1998

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEST 98-308-M
 : A.C. No. 04-04950-05528
WESTERN AGGREGATES, INC. :

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, 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 23, 1998, the Commission received from Western Aggregates, Inc. (Western Aggregates), a letter dated June 22 requesting that the Commission reopen 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 Western Aggregates.

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 June 22 letter, John Trembley, Plant Manager at Western Aggregates, asserts that Western Aggregates' failure to timely file a hearing request to contest proposed penalties resulted from its mistaken mailing of the request to a payment lockbox of the Department of Labor's Mine Safety and Health Administration (MSHA) in Pittsburgh, Pennsylvania, rather than to MSHA's Civil Penalty Compliance Office in Virginia. Western Aggregates attached to the June 22 letter various documents, including a letter dated May 21, 1998, from Western Aggregates to

MSHA's Civil Penalty Compliance Office, a Federal Express ASender Activity Summary@showing that a delivery sent by Western Aggregates was received at MSHA's payment lockbox on April 1, 1998, and a response letter from MSHA to Western Aggregates dated June 11, 1998. According to its May 21 letter, Western Aggregates mailed a hearing request on March 31 to MSHA's payment lockbox in Pennsylvania. MSHA's June 11 response letter alleges that on March 3, 1998, MSHA mailed a notice of proposed penalties to Western Aggregates, that the operator received the notice on March 6, and that the proposed penalties became final on April 5. MSHA also indicates in the letter that because Western Aggregates was unable to present a copy of the hearing request and the Federal Express ASender Activity Summary@did not indicate what was sent in the package, the operator was required to pay the proposed penalties and associated costs.

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). *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). 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 Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Drummond Co.*, 17 FMSHRC 883, 884 (June 1995).

On the basis of the present record, we are unable to evaluate the merits of Western Aggregates' position. As indicated in MSHA's June 11 letter, the Activity Summary does not indicate what Western Aggregates sent to MSHA's lockbox in Pittsburgh. In the interest of justice, we remand the matter for assignment to a judge to determine whether Western Aggregates has met the criteria for relief under Rule 60(b). If the judge determines that relief under Rule 60(b) is appropriate, this 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

Robert H. Beatty, Jr., Commissioner

Distribution

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