

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 7, 2001

| | | |
|------------------------------------|---|------------------------|
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| v. | : | Docket No. WEVA 2001-6 |
| | : | |
| AHERN & ASSOCIATES, INCORPORATED : | : | |

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Jordan, Chairman; Beatty, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On October 30, 2000, the Commission received from Ahern & Associates, Inc. (“Ahern”) 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 the motion for relief filed by Ahern.

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 motion submitted by William Casto, Ahern’s vice president, Ahern contends that it timely submitted a hearing request to the Department of Labor’s Mine Safety and Health Administration (“MSHA”) on July 24, 2000, but that MSHA apparently did not receive its hearing request. Ahern asserts that it subsequently received a notification from MSHA on October 10, 2000, that it was delinquent in the payment of the proposed assessment. *Id.* Ahern contends that it

contacted MSHA and initially was informed that a hearing could be scheduled, but that it later received a letter from MSHA indicating that the matter was closed. *Id.* Ahern requests that the Commission grant its request for relief and reopen the matter so that it may proceed to a hearing on the merits. *Id.* Attached to its request is a copy of the proposed penalty assessment marked with the notation “Returned 7/24/00,” and the notice of delinquent payment from MSHA. Ex. A.

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 Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *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 Preparation Sers., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). 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 Ahern’s position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Ahern has met the criteria for relief under Rule 60(b). *See BR&D Enters., Inc.*, 22 FMSHRC 479, 481 (Apr. 2000) (remanding to the judge where operator alleged that it timely submitted green card, but never received return receipt); *W. Aggregates, Inc.*, 20 FMSHRC 745, 747 (July 1998) (remanding to the judge where operator mistakenly filed green card with MSHA’s regional office, rather than with MSHA’s Civil Penalty Compliance Office in Arlington, Virginia). 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.

Mary Lu Jordan, Chairman

Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, concurring in result:

We would grant the operator's request for relief here, because the Secretary does not oppose and the operator has offered a sufficient explanation for its failure to timely respond. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Rule 60(b). *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Distribution

William G. Casto, Vice President
Ahern & Associates, Inc.
P.O. Box 9367
South Charleston, WV 25309

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006