

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 27, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 99-28
	:	A. C. No. 46-07711-03679
EAGLE ENERGY, 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 December 4, 1998, the Commission received from Eagle Energy, Inc. (“Eagle Energy”), 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). While the Secretary of Labor does not oppose Eagle Energy’s motion requesting relief under Fed. R. Civ. P. 60(b), the Secretary opposes Eagle Energy’s alternative argument that the operator timely filed the notice of contest (“green card”).

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).

Eagle Energy submits that its failure to timely contest Citation No. 7163791 was due to the operator’s reliance on a statement made by an MSHA representative. E. Mot. at 2. Citation No. 7163791 alleged a violation of 30 C.F.R. § 70.101 (regulating the level of respirable dust in underground coal mines when quartz is present) and was issued after a single air sample was collected by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). Eagle Energy states that it received the proposed penalty assessment related to Citation No. 7163791 on October 7, 1998. *Id.* It alleges that, on October 13, MSHA District IV Manager Pat

Brady stated at an MSHA “Problem Solving Seminar” that “all citations issued under the single sample collection method would be vacated by MSHA.” *Id.* The operator contends that, on November 6, 1998, at a meeting at the MSHA Office in Mt. Hope, West Virginia, Larry Ward, Eagle Energy’s vice president, asked Brady why the citation had not been vacated. *Id.* Brady responded that he had “not ‘correctly read the memo’” when he made the October 13 statement, and informed Ward that “the citations must be first contested and then MSHA would vacate the citations.” *Id.* However, by November 6, the date Eagle Energy learned that it was required to contest the citation before it could be vacated, the proposed penalty had already become a final order of the Commission. Eagle Energy asserts that the Commission may treat its failure to timely contest the proposed penalty as excusable neglect under Rule 60(b)(1). *Id.* at 5.

In the alternative, Eagle Energy submits that its notice of contest was timely filed. *Id.* The operator argues that, because it filed its notice of contest by mail, five days should have been added to the time allowed for it to respond to MSHA’s proposed penalty — which was received on October 7 — pursuant to Commission Procedural Rule 8.¹ *Id.* The operator thus requests the Commission to read Procedural Rules 8 and 5(d) — which states that filing is effective upon mailing (29 C.F.R. § 2700.5(d)) — together and consider the November 10 mailing of its notice of contest timely. *Id.* at 6.

The Secretary takes exception to Eagle Energy’s alternative grounds for relief. She asserts that, pursuant to section 105(a) of the Mine Act, the citation and proposed penalty became a final order of the Commission on November 6, 30 days after the date Eagle Energy received the proposed penalty. S. Response at 1-2 (citing 30 U.S.C. § 815(a)). The Secretary also requests that, should the Commission grant Eagle Energy’s request to reopen, the order be narrowly tailored to affect only Citation No. 7163791 and the related penalty since the operator offers no basis for relief from the two other citations contained in the relevant Proposed Assessment Form. *Id.* at 2.

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 also have 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 previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925

¹ Procedural Rule 8 provides in pertinent part: “When service of a document is by mail, 5 days shall be added to the time allowed by these rules for the filing of a response or other documents.” 29 C.F.R. § 2700.8.

(Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

The record indicates that Eagle Energy intended to contest Citation No. 7163791, and that, but for its reliance upon an MSHA representative's assertion, it likely would have contested the proposed penalty. It appears from the green card belatedly filed with MSHA that Eagle Energy did not intend to contest the penalties proposed for two other citations in the same proposed assessment. *See Ex. 4*. In the circumstances presented here, Eagle Energy's late filing of a hearing request may be considered inadvertence or excusable neglect within the meaning of Rule 60(b)(1). *See National Lime & Stone*, 20 FMSHRC at 924-25 (reopening matter when operator's late filing of hearing request was due to mutual misunderstanding between counsel for the operator and counsel for MSHA as to need to challenge penalty assessment prior to judge's approval of parties' settlement); *Stillwater*, 19 FMSHRC at 1022-23 (granting operator's motion to reopen when operator failed to submit request for hearing to contest proposed penalty due to lack of coordination between recipient of assessment at mining facility and its attorneys, after indicating intent to contest related citation).

Accordingly, in the interest of justice, we reopen this penalty assessment that became a final order with respect to Citation No. 7163791.² Further, in the interest of expeditious resolution of this matter, we hereby direct the Chief Administrative Law Judge to order the Secretary to show cause within 14 days of the date of his order why Citation No. 7163791 and the related civil penalty should not be vacated. *See Keystone Coal Mining Corp.*, 16 FMSHRC 6, 16 (Jan. 1994); *National Mining Association v. Secretary of Labor*, 153 F.3d 1264, 1269 (11th Cir. 1998).

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

² Given our disposition, we do not reach Eagle Energy's alternative argument that its November 10, 1998 mailing of its notice of contest was timely.

Distribution

Julia K. Shreve, Esq.
Jackson & Kelly
P.O. Box 553
Charleston, WV 25322

Steven D. Turow, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

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