

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 10, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2002-109-M
v.	:	A.C. No. 35-03516-05502
	:	
B & B CRUSHING	:	

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 December 5, 2001, the Commission received from B & B Crushing (“B & B”) 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).

On August 13, 2001, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment (A.C. No. 35-03516-05502) to B & B for the sum of \$321 relating to Citation No. 07986780. In its request, B & B asserts that it did not file a hearing request to contest the proposed penalty because it believed the civil penalty should have been included in an Order of Dismissal issued by Administrative Law Judge Jerold Feldman on July 18, 2001 (Docket No. WEST 2001-408-M). Mot. Apparently proceeding pro se, B & B attached a copy of the dismissal order to its request. *Id.*, Attach. The dismissal order involved

another proposed penalty assessment (A.C. No. 35-03516-0551) issued to B & B on April 13, 2001, involving Citation Nos. 7986781, 7986782, and 7986784. In the dismissal order, the judge vacated the three citations and dismissed the proceedings. There is nothing in the record for Docket No. WEST 2001-408-M to indicate that the dismissal order should have included Citation No. 07986780.

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, however, we are unable to evaluate the merits of B & B's position. In particular, B & B provides no explanation or supporting evidence for its assertion that Citation No. 07986780 should have been included in the dismissal order issued on July 18, 2001. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See Eclipse C Corp.*, 23 FMSHRC 134, 134-36 (Feb. 2001) (remanding to judge where operator filed request for hearing in one proceeding and mistakenly believed that request applied to other citations it received at the same time). 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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