FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 7, 2002

SECRETARY OF LABOR,	:	Docket Nos.	WEST 2002-202-M
MINE SAFETY AND HEALTH	:		A.C. No. 35-02479-05515
ADMINISTRATION (MSHA)	:		
	:		WEST 2002-203-M
v.	:		A.C. No. 35-02479-05516
	:		
	:		WEST 2002-222-M
TIDE CREEK ROCK, INC.	:		A.C. No. 35-02479-05508

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 February 5, 2002, the Commission received from Tide Creek Rock, Inc. ("Tide Creek") a request to 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).

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, Tide Creek contends that it did not receive the proposed penalty assessments from the Department of Labor's Mine Safety and Health Administration ("MSHA") because the certified mailings could not be delivered to the mine and were returned to MSHA undelivered due to the mine's remote location and the absence of a person to receive the mailings. Mot. at 13, 16; Ex. 3. The operator claims that John A. Petersen, the representative of miners at Tide Creek responsible for MSHA matters, never received the proposed assessments and if he had, the operator would have contested all penalty assessments. *Id.* at 12-15. It explains that it received over 70 citations between September 29, 1999 and April 6, 2000, and that contest proceedings for many of these citations and penalty assessments were pending before Chief Administrative Law Judge Barbour while it was awaiting proposed assessments for 36

outstanding citations. *Id.* at 4-5. The operator asserts that during this time, it called MSHA on numerous occasions and sent several letters inquiring about the status of these outstanding proposed assessments in an effort to file a hearing request. *Id.* at 6-11.[1]

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).

In essence, Tide Creek, which is proceeding pro se, claims that it did not receive the penalty assessments at issue because MSHA's certified mailings were unsuccessful. Tide Creek's motion clearly demonstrates that numerous attempted deliveries of certified mail to the company were unsuccessful. A letter from Tide Creek to MSHA dated May 7, 2001 states that the company "received a notice of a certified letter on April 16, 2001, but it [i.e., the letter] was returned to you and we do not know what it was." Mot. Ex. 2. A later letter from MSHA to Tide Creek confirms that "no one picked up the certified return receipt mail containing [two of] the assessments" at issue here, despite three delivery attempts by the U.S. Postal Service. Mot. Ex. 3 (Dec. 28, 2001). The delivery attempts were made during June and July of 2001. *Id*.

It is also clear from the attachments to Tide Creek's motion that the company intended to contest any penalties assessed for citations it received from September 1999 through April 2000. The company's May 7, 2001 letter to MSHA, for example, includes a long list of citation numbers and states that, if the certified mail it failed to receive was a penalty assessment, the company wanted "to contest the proposed assessments and . . . REQUEST A HEARING ON THE VIOLATIONS." Mot. Ex. 2.

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[1] In its motion, Tide Creek also argues that MSHA unreasonably delayed assessing many of the penalties at issue, that the company's ability to continue in business would be compromised if the assessments must be paid, that the company failed to receive adequate notice of the assessments, that the company's communications with MSHA should be deemed to constitute adequate hearing requests, and that the company is entitled to attorney's fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1). All these matters fall outside the scope of our review of Tide Creek's motion, and we thus do not reach them.

It is not clear, however, from Tide Creek's motion exactly why the company was unable to either receive certified mail[2] or, more importantly, respond to notices of attempted delivery of certified mail by retrieving the mail at the local post office. In one of its exhibits, the company admits it received such a notice. *Id.* (May 7, 2001) ("We received a notice of a certified letter . . ."). The company asserts that its address "is a rural mail box, and that certified mail often did not get delivered." Mot. at 16 ¶ 23. But no further explanation is offered regarding efforts to address these mailing difficulties, in the absence of which we are unable to determine whether Tide Creek's failure to file the penalty contests was the result of mistake or inadvertence.

In the interests of justice, however, we remand this matter for assignment to a judge to determine whether relief from the final orders is appropriate. *See Pasco Gravel Co.*, 24 FMSHRC 16 (Jan. 2002) (remanding default motion to judge to determine whether relief from final order was appropriate where operator alleged that it did not receive proposed assessments and had requested a hearing twice on the telephone to an MSHA supervisor). 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.

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Theodore F. Verheggen, Chairman

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Mary Lu Jordan, Commissioner

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Robert H. Beatty, Jr., Commissioner

[2] Under 30 C.F.R. Part 41, a mine operator is required to file with MSHA detailed information regarding its legal identity, including its address.

Distribution

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