

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

June 21, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEST 2000-311-M
	:	through WEST 2000-314-M
CITY TRANSFER OF KENT,	:	
INCORPORATED	:	

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

ORDER

BY: Jordan, Chairman; Riley and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On April 21, 2000, the Commission received from City Transfer of Kent, Inc. (“City Transfer”) 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). The Secretary of Labor does not oppose the motion for relief filed by City Transfer.

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 request, City Transfer, which is represented by Environmental Compliance & Remediation, Inc., states that when it received the citations, “there was no formal statement from MSHA on the appeals process,” contrary to the past practice by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) of including “a post card with citations that could be sent back to MSHA requesting an informal meeting.” Letter dated April 12, 2000. It also contends that it previously mailed letters dated August 4 and 18, 1999 to MSHA contesting the citations in these cases because they were unjust and unsubstantiated, and requesting a hearing. *Id.* and attaches. It alleges that it never received a response to its letters. Letter dated April 12, 2000. City Transfer attached to its request copies of several letters, dated May 24, August 4, and August 18, 1999, which it allegedly sent to MSHA’s regional office in Bellevue, Washington

contesting the citations; a return receipt for a mailing to MSHA's regional office delivered on November 7, 1999; and a letter dated October 29, 1999, which it allegedly sent to MSHA's Civil Penalty Compliance Office indicating that it sent the August 4 and 18 letters and inquiring into the status of its hearing request. Attachs. Accordingly, City Transfer requests a hearing on Citation Nos. "796948 — 796979." Letter dated April 12, 2000.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, eg., Kenamerican Resources, Inc.*, 20 FMSHRC 199, 201 (Mar. 1998); *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 Preservation 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 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

On the basis of the present record, we are unable to evaluate the merits of City Transfer's position.<sup>1</sup> In the interest of justice, we remand the matter for assignment to a judge to determine whether City Transfer has met the criteria for relief under Rule 60(b). See *Bauman Landscape, Inc.*, 22 FMSHRC 289, 289-90 (Mar. 2000) (remanding to a judge where the operator claimed that it never received the proposed penalty assessment and owner did not sign the return receipt without submitting any supporting documentation); *Warrior Investment Co.*, 21 FMSHRC 971, 973 (Sept. 1999) (remanding where operator claimed that it did not receive proposed penalty assessment and record did not clearly indicate why service was unsuccessful). 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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Mary Lu Jordan, Chairman

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James C. Riley, Commissioner

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Robert H. Beatty, Jr., Commissioner

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<sup>1</sup> In view of the fact that the Secretary does not oppose City Transfer's motion to reopen this matter for a hearing on the merits, Commissioners Marks and Verheggen conclude that the motion should be granted.

Distribution

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