

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 12, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket No. WEST 2000-76-M
	:	A.C. No. 42-02242-05501
OGDEN CONSTRUCTORS, INC.	:	

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 December 10, 1999, the Commission received from Ogden Constructors, Inc. (“Ogden”) 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 Ogden.

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, Ogden asserts that its failure to file a hearing request to contest the proposed penalty for an alleged violation of a mandatory standard was due to its mistaken belief that the cited crushing plant was not subject to the jurisdiction of the Department of Labor’s Mine Safety and Health Administration (“MSHA”). Mot. at. 1. It explained that its Utah office closed earlier in the year and that it was led to believe by project sponsors that the new location and “purpose” of the crushing plant would place it under the jurisdiction of the Occupational Safety and Health Administration, and the Army Corps of Engineers, rather than MSHA. *Id.* Ogden maintains that, after consulting with MSHA, it subsequently determined that the plant was subject to MSHA jurisdiction, but that by then the time for contesting the citation had expired. *Id.* It further states that personnel from the Utah office were relocated throughout the country,

making it difficult to route correspondence to the proper person. *Id.* Ogden submits that the person assigned with the overall responsibility for health and safety is no longer employed by Ogden, and that it has not been successful in locating the original proposed assessment. *Id.* at 2. Accordingly, it requests that the Commission reopen the final order. *Id.*

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, e.g., Jim Walters Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co., Inc.*, 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 Services, Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence, mistake, or excusable neglect. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

On the basis of the present record, we are unable to evaluate the merits of Ogden's position.¹ In the interest of justice, we remand the matter for assignment to a judge to determine whether Ogden has met the criteria for relief under Rule 60(b). *See M&Y Services, Inc.*, 19 FMSHRC 670, 671-72 (April 1997) (remanding when proposed penalty became final order because operator was unfamiliar with Commission procedure). 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

James C. Riley, Commissioner

Robert H. Beatty, Commissioner

¹ In view of the fact that the Secretary does not oppose Ogden'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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