

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

March 8, 2000

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| | : | |
| v. | : | Docket No. WEST 2000-93-M |
| | : | A.C. No. 04-05247-05508 A |
| BAUMAN LANDSCAPE, 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 27, 1999, the Commission received from Bauman Landscape 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 Bauman Landscape.

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 his request, Michael Bauman, an owner of Bauman Landscape, asserts that he did not receive a copy of the original proposed penalty assessment. Mot. Bauman states that he was not aware of the proposed penalties and thus, never had an opportunity to appeal them. *Id.* Bauman claims that the U.S. Postal return receipt was not signed by him. *Id.* He asserts that he already has paid penalties for the same violations giving rise to the subject penalties. *Id.* Bauman requests an opportunity for a hearing to appeal these penalty assessments. *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., Harvey Trucking*, 21 FMSHRC 567 (June 1999) (remanding to a judge where the operator did not receive the proposed penalty assessment because delivery was unsuccessful for no known reason); *Gary Klinefelter*, 19 FMSHRC 827, 828 (May 1997)

(remanding the matter to a judge where delivery of the proposed assessment was unsuccessful and movant offered no explanation for unsuccessful delivery); *Waste Coal Management, Inc.*, 14 FMSHRC 423, 423-24 (Mar. 1992) (remanding where default order sent by certified mail may not have been received by operator). 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 Servs., 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 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 Bauman's position.¹ In the interest of justice, we remand the matter for assignment to a judge to determine whether Bauman has met the criteria for relief under Rule 60(b). 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, Jr., Commissioner

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