

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

April 17, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2001-182-M
	:	A.C. No. 04-04075-05588
v.	:	
	:	
KAISER CEMENT CORPORATION	:	Docket No. WEST 2001-183-M
	:	A.C. No. 04-04075-05590

BEFORE: Jordan, Chairman; Riley, Verheggen, 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 January 23, 2001, the Commission received from Kaiser Cement Corporation (“Kaiser”) 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 Kaiser’s motion for relief.

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, Kaiser, which is represented by counsel, asserts that it mishandled and inadvertently paid two proposed penalty assessments associated with citations that it had previously contested. Mot. at 1-3. Specifically, Kaiser submits that on March 16-18, 1999, it received the underlying citations from the Department of Labor’s Mine Safety and Health Administration (“MSHA”), and on April 15, 1999, it filed Notice of Contests for each citation. *Id.* at 1. Kaiser contends that its contests were docketed and assigned to Administrative Law Judge

Richard W. Manning, who granted the Secretary's request to stay proceedings pending the issuance of the associated proposed penalties. *Id.* at 1-2. It asserts that in July 1999, its Safety Director Danny Lowe, who had handled the citations, left Kaiser, and that its Purchasing Director, Jack Hewton, temporarily assumed the responsibilities of Safety Director. *Id.* at 2. Subsequently, on January 24 and April 3, 2000, Kaiser contends that Hewton received the proposed penalty assessments for the underlying citations and, unaware that Kaiser had previously contested the underlying citations, initiated payment. *Id.* at 2-3. Kaiser asserts that payment of the proposed assessments and failure to submit the green cards were the result of an administrative mistake and miscommunication during a transition period in its safety department, amounting to inadvertence or a genuine mistake, and that it intended to continue to contest the citations and penalties. *Id.* at 3-4. It also argues that genuine issues exist regarding the merits of the civil penalties and underlying citations, and requests that the Commission grant its request for relief. *Id.* Attached to its request is the affidavit of Jack Hewton which supports Kaiser's allegations. Attach.

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," Fed. R. Civ. P. 60(b). *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 Nat'l Lime & Stone Co., Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

The record indicates that Kaiser intended to contest the proposed penalty assessments, but that it failed to do so in a timely manner due to internal mismanagement. The declaration attached to Kaiser's request appears to be sufficiently reliable and supports Kaiser's allegations. In the circumstances presented here, we will treat Kaiser's late filing of a hearing request as resulting from inadvertence or mistake.<sup>1</sup> *See Martin Marietta Aggregates*, 22 FMSHRC 1178, 1179-80 (Oct. 2000) (granting motion to reopen where operator's inadvertent payment of the proposed assessment was due to processing error by its accounts payable department and operator attached notarized statement supporting its allegations); *Doe Run Co.*, 21 FMSHRC 1183, 1184-85 (Nov. 1999) (granting the motion to reopen where the employee responsible for handling penalties was out of the country and mishandling of the proposed assessments resulted in mistaken payment); *Cyprus Emerald Res. Corp.*, 21 FMSHRC 592, 593-94 (June 1999) (granting motion to reopen

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<sup>1</sup> In any case, Commissioners Riley and Verheggen would grant Kaiser's request for relief on the basis that it is not opposed by the Secretary, and because no other circumstances exist that would render such a grant problematic.

where operator supported its allegation that it mistakenly paid proposed penalty assessment with an affidavit).

Accordingly, in the interest of justice, we grant Kaiser's request for relief, reopen these penalty assessments that became final orders, and remand to the judge for further proceedings on the merits. The 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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Theodore F. Verheggen, Commissioner

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Robert H. Beatty, Jr., Commissioner

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