FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

May 11, 2000

SECRETARY OF LABOR,	:		
MINE SAFETY AND HEALTH	:	Docket No.	WEST 2000-155-M
ADMINISTRATION (MSHA)	:		WEST 2000-156-M
	:		WEST 2000-157-M
v.	:		WEST 2000-158-M
	:		WEST 2000-159-M
SAN BENITO AGGREGATES,	:		WEST 2000-160-M
INCORPORATED	:		

BEFORE: Jordan, Chairman; Marks, 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 February 7, 2000, the Commission received from San Benito Aggregates, Inc. ("San Benito") a request to reopen six 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). On March 2, the Commission received the Secretary's response, opposing the request.

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 letter, David Grimsley, owner of San Benito Aggregates, Inc. ("San Benito"), a small quarry in Hollister, California, asserts that he was not informed by his staff of the violations associated with these penalty assessments until he received a demand letter for payment from the Department of Labor's Mine Safety and Health Administration ("MSHA") in late December 1999. Mot. Grimsley states that he was not informed "for reasons unbelievable to me." *Id.* He claims that he has reevaluated his operations and has made "serious adjustments where needed." *Id.* He offers that his company is in financial crisis and that the penalties would have a substantial impact. *Id.* Accordingly, San Benito requests an opportunity to contest the six proposed penalties. *Id.*

The Secretary asserts that San Benito does not meet the standards for relief under Fed. R. Civ. P. 60(b) because it has failed to establish that its conduct amounts to "excusable neglect." S. Opp'n. to Mot. at 1-2. She states that the only explanation San Benito offers for its failure to contest the penalty assessments is that it had internal management problems, and that mistakes and omissions of an operator's staff do not constitute excusable neglect. *Id.* at 5-7. The Secretary notes that San Benito received the six penalty assessments at issue, which include 61 violations totaling $33,722 in penalties, over the course of 6½ months. *Id.* at 2-3, 7; Attach. A. She asserts that San Benito also received five notices, one for each of the first five penalty assessments, but failed to respond to either the penalty assessments or the notices until it received a letter from MSHA dated December 8, 1999, demanding payment of all six penalty assessments and threatening referral to the Department of Justice for collection. *Id.* at 3-4; Attach. B-D. The Secretary also offers that San Benito is familiar with MSHA procedure because it received penalty assessments for 120 violations over the past 13½ years. *Id.* at 4; Attach. E. Finally, the Secretary contends that granting San Benito relief under these circumstances would be unfair to compliant operators and inconsistent with effective enforcement of the Mine Act. *Id.* at 7-8. Accordingly, the Secretary requests that the Commission deny San Benito's request for relief. *Id.* at 8.

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). 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 Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Drummond Co.*, 17 FMSHRC 883, 884 (June 1995).

On the basis of the present record, we are unable to evaluate the merits of San Benito's request. Although it appears that San Benito has offered an explanation for its failure to timely file a hearing request, it has not attached sufficiently reliable documents to substantiate its allegations. Moreover, the Secretary, in her opposition, has alleged facts in addition to those raised by San Benito. We are unable to evaluate this factual record at an appellate level.[1] In the interest of justice, we thus remand the matter for assignment to a judge to determine whether San Benito 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

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

[1] Commissioners Beatty and Riley believe that the Commission should remand to an administrative law judge to determine whether the criteria for relief under Rule 60(b) have been met whenever the request to reopen or any response thereto raises factual issues irrespective of whether or not the Secretary of Labor objects to or opposes an operator's request for relief. Commissioners Beatty and Riley believe that any factual issues raised by a request to reopen under Rule 60(b) or any response should be resolved in the first instance by a judge, as the trier of fact.

Distribution

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