

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 31, 2001

SECRETARY OF LABOR,	:	Docket No. WEST 2001-511-M
MINE SAFETY AND HEALTH	:	A.C. No. 02-02626-05528
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2001-512-M
v.	:	A.C. No. 02-02626-05529
	:	
ASARCO, INC.	:	Docket No. WEST 2001-513-M
	:	A.C. No. 02-02626-05530
	:	
	:	Docket No. WEST 2001-584-M
	:	A.C. No. 02-02626-05528

BEFORE: Verheggen, Chairman; Jordan, Riley, 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 June 29, August 23 and October 18, 2001, Asarco, Inc. (“Asarco”) filed with the Commission requests 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).¹

¹ Asarco’s June 29 request was filed in Docket Nos. WEST 2001-511-M, WEST 2001-512-M, and WEST 2001-513-M; its October 18 request was filed in WEST 2001-511-M; and its August 23 request was filed in Docket No. WEST 2001-584-M. The civil penalty proceeding identified by Docket No. WEST 2001-584-M is duplicative of the civil penalty proceeding identified by Docket No. WEST 2001-511-M because both proceedings encompass the same proposed penalty assessment. Accordingly, we hereby dismiss Docket No. WEST 2001-584-M as duplicative of Docket No. WEST 2001-511-M.

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 motions, Asarco asserts that it intended to contest the proposed penalties, but that it did not submit green cards because it inadvertently paid the assessments.² Mot. (6-29-01) at 4, 7; Mot. (8-23-01) at 2, 6; Mot. (10-18-01) at 2, 6. Asarco submits that the Department of Labor's Mine Safety and Health Administration ("MSHA") issued fifty-five citations to Asarco following an accident at Asarco's Mission Underground mine, and that it filed notices of contest as to all of those citations. Mot. (6-29-01) at 3; Mot. (8-23-01) at 1; Mot. (10-18-01) at 1. Asarco states that contests of 26 citations have been stayed pending a criminal investigation; 5 contests have been the subject of summary decision; and 24 contests remain pending. Mot. (6-29-01) at 3; Mot. (8-23-01) at 1-2; Mot. (10-18-01) at 1-2. It states that in addition to handling the litigation related to those citations, it has been involved in three discrimination cases that broadly relate to the citations. Mot. (6-29-01) at 3-4; Mot. (8-23-01) at 2; Mot. (10-18-01) at 2. Asarco explains that on January 19 and 23, 2001, Asarco personnel mistakenly paid the penalties for "some (but not all)" of the citations at issue in the pending contests because they were unaware that Asarco management was pursuing the contests. Mot. (6-29-01) at 4, 6-8; Mot. (8-23-01) at 2, 5-7; Mot. (10-18-01) at 2, 5-7. Asarco attached to its June 29 motion the declaration of Irwin P. Graham, the General Mine Supervisor at the Mission Underground mine; and Asarco's opposition to the Secretary's motion to dismiss. Asarco attached to its August 23 motion the identical declaration of Irwin P. Graham; an order issued by Administrative Law Judge Richard Manning on August 9, 2001; and the Secretary's response to Asarco's June 29 motion to reopen. Asarco attached to its October 18 motion copies of previous attachments; the Secretary's response to Asarco's August 23 motion; and a letter to Judge Manning dated October 16, 2001.

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

² The proposed penalty assessments related to Docket Nos. WEST 2001-511-M, WEST 2001-512-M, and WEST 2001-513-M set forth the proposed penalties for twenty-six citations. In the captions of its motions to reopen, Asarco lists twenty-three citations that it wishes to reopen because they allegedly are associated with penalties that it paid in error. It has been determined administratively that, in addition to those twenty-three penalties, the penalties associated with the following citations have been paid, although Asarco did not include the citations in its list: Citations Nos. 07945579 (A.C. No. 02-02626-05528); 07945580 (A.C. No. 02-02626-05528); and 07934552 (A.C. No. 02-02626-05530).

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 Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate Asarco’s position. Although Asarco lists twenty-three citations in its motions to reopen, and states that it paid the penalties for some, but not all, of the citations at issue in the contests that were not stayed, it appears that it might have paid twenty-six penalties. *See* n.2, *supra*. Because of this confusion in the record, and in the interest of justice, we remand the matter for assignment to a judge to determine which citations are the subject of Asarco’s requests for relief from final order, and whether relief from the final order is appropriate. 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.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

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