

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

April 30, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2002-47
v.	:	A.C. No. 46-07178-03571
	:	
CATENARY COAL COMPANY	:	

BEFORE: Verheggen, Chairman; Jordan 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 25, 2002, the Commission received from Catenary Coal Company (“Catenary”) a motion made by counsel 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).

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 motion, Catenary contends that on October 18, 2001, it received a proposed penalty assessment relating to Citation Nos. 7185826-27 and 7185845-48. Mot. at 1. It asserts that on October 24, 2001, its safety manager, Terry Tolley, mailed a request for a hearing (“green card”) relating to the penalties for these citations. *Id.* at 1-2; Ex.1. Catenary received a delinquency letter, dated January 28, 2002, from the Department of Labor’s Mine Safety and Health Administration (“MSHA”) stating that Catenary’s green card had not been received by MSHA

until January 10, 2002. Mot. at 1-2; Ex. 2. The delinquency letter stated that, as a consequence of the untimely filing of the green card, the proposed penalty assessment had become a final order of the Commission. Ex. 2. Catenary states that it does not know why receipt of the green card by MSHA was delayed. Mot. at 1. Attached to Catenary's request is a signed affidavit by Tolley supporting its allegations. Ex.1.

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 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).

The record indicates that Catenary intended to contest the proposed penalties, and that it mailed its request for a hearing to MSHA within the 30-day time limit. *See* Ex. 1 (Tolley Affidavit). The affidavit attached to Catenary's motion is sufficiently reliable and supports the company's allegations. *Id.* In the circumstances presented here, we find Catenary's failure to timely file its hearing request with MSHA due to inadvertence or mistake within the meaning of Rule 60(b)(1). *See Chantilly Crushed Stone, Inc.*, 22 FMSHRC 17, 17-19 (Jan. 2000) (granting operator's motion to reopen where order became final because green card received late by MSHA, but where operator believed it timely mailed green card and its allegations were supported by affidavit).

Accordingly, in the interest of justice, we grant Catenary's unopposed request for relief to reopen the penalty assessment that became a final order with respect to Citation Nos. 7185826-27 and 7185845-48. We remand this matter to the Chief Administrative Law Judge for assignment to a judge. On remand, 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

---

Robert H. Beatty, Jr., Commissioner

Distribution

Anne Wathen O'Donnell, Esq.  
Arch Coal, Inc.  
CityPlace One, Suite 300  
St. Louis, MO 63141

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd., Suite 400  
Arlington, VA 22203

Chief Administrative Law Judge David Barbour  
Federal Mine Safety & Health Review Commission  
1730 K Street, N.W., Suite 600  
Washington, D.C. 20006