

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 23, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. YORK 2001-65-M
	:	A.C. No. 19-01081-05502
READ SAND & GRAVEL	:	

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 22, 2001, the Commission received from Read Sand & Gravel (“Read”) 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).¹

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

¹ On June 22, 2001, the Docket Office received a telephone call from Debbie Johnson, an employee of the Department of Labor’s Mine Safety and Health Administration (“MSHA”), inquiring about the status of a request filed by Read in February 2001. The Docket Office informed Ms. Johnson that the Commission had not received the request. On that same day, Ms. Johnson faxed to the Commission the subject request, which includes a letter from Read to the Commission dated February 28, 2001, and a letter from Read to Ms. Johnson dated February 26, 2001.

penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a). Read failed to timely submit a request for a hearing to contest the proposed assessment.

In its request, Read states that it is enclosing a petition to reopen the proceedings. Mot. Attached to the request is a letter dated February 26, 2001, in which Read states the following reasons for its contest of the proposed civil penalties: (1) it does not own, control or manage the subject property; (2) many of the violations were not within the scope of Mine Act jurisdiction because they did not involve the excavation or screening of sand; (3) some of the cited areas are outside of the mine area; and (4) the president and sole shareholder was “never contacted or otherwise approached by [MSHA] as to visits, issues, or violations.” Attach. Ltr. dated February 26, 2001.

On June 29, 2001, the Commission received a response to Read’s request from the Secretary of Labor. The Secretary contends that the first three grounds set forth by Read in its request pertain to the merits of the underlying case, rather than to the grounds for reopening the proposed penalty assessment that became a final order. Resp. at 2. She submits that although the fourth ground may pertain to reopening, Read failed to provide sufficient detail to enable the Secretary to determine whether reopening is warranted. *Id.* The Secretary notes that MSHA received a certified mail receipt indicating that the assessment was received by Read. *Id.* at 2-3 n.2.

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).

On the basis of the present record, we are unable to evaluate the merits of Read's position. In the interest of justice, we remand the matter for assignment to a judge. *See, e.g., Red Coach Trucking*, 23 FMSHRC 125, 127 (Feb. 2001) (remanding where operator made unsubstantiated allegation that it failed to mail hearing request in part because owner was not at the site where proposed penalty assessment was sent). The judge shall direct Read to provide a more detailed explanation of why it believes that circumstances regarding MSHA's alleged failure to contact its president warrants reopening the matter, and shall allow the Secretary an opportunity to respond. The judge shall then determine 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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