FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 20, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2001-316-M
v.	:	A.C. No. 03-00791-05535
	:	
ROGERS GROUP, INCORPORATED	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On January 9, 2002, the Commission received from Rogers Group, Inc. ("Rogers") a request to vacate an Order of Default issued on December 4, 2001, by Chief Administrative Law Judge David F. Barbour. R. Mot. at 1. In the default order, the judge dismissed this civil penalty proceeding for the failure of Rogers to answer the Petition for Assessment of Penalty filed by the Secretary of Labor on August 13, 2001, or the judge's Order to Respondent to Show Cause issued on September 28, 2001. The judge assessed civil penalties in the sum of $1,500, proposed by the Secretary.

The judge's jurisdiction in this matter terminated when his decision was issued on December 4, 2001. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Rogers filed its request with the Commission on January 9, 2002, six days past the 30-day deadline. Because the Commission did not direct review on its own motion, the judge's default order became a final decision of the Commission 40 days after its issuance. *Id.*

When considering whether relief from a final Commission decision is appropriate, 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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (May 1993). 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).

In its request, Rogers, apparently proceeding pro se, contends that it submitted a green card requesting a hearing but that, "due to reasons unclear to us at this time," it failed to answer the Secretary's petition for penalty assessment or the judge's show cause order. R. Mot. at 1.[1] Although Rogers does not explain in its request why it failed to appeal the default order to the Commission before the 30-day deadline, the record indicates that there may have been some confusion as to the correct address for the operator. The record shows that the default order was first sent by the Commission to Elliott at the address listed for Rogers on the Proposed Penalty Assessment but it was returned undelivered. In returning the undelivered envelope containing the default order to the Commission, the U.S. Postal Service stamped Rogers' new address on the front of the envelope. The Commission then sent the default order to Rogers' new address and the return receipt indicates that it was received by the operator on December 26, 2001, twenty-two days after the default order was first issued.

On January 14, 2002, the Commission received a motion from the Secretary opposing Rogers' request to vacate the default order. Sec'y Mot. at 1. She asserts that Rogers' request fails to establish that it satisfies one or more of the criteria required for relief under Rule 60(b). *Id.*

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[1] Safety manager Jerry Teeler, who submitted the letter seeking relief, wrote that "[i]t is unknown why I did not receive the associated paperwork for this citation until January 3, 2002." R. Mot. at 1. We note, however, that on the form the company returned to MSHA requesting a hearing on the civil penalty, the name "Ed Elliott" was written in the blank under "Company Official to Contact." The certificate of service on the Secretary's Petition for Assessment of Penalty states that the petition was sent to Elliott by certified mail. Similarly, the judge's Order to Show Cause states that it was sent by certified mail to Elliott and the return receipt from that order indicates that it was delivered on October 2, 2001, with an agent of the addressee signing for it.

Because of the confusion in the record, we are unable to evaluate Rogers' request. In the interest of justice, we hereby reopen this proceeding and remand it to the judge, who shall determine whether relief from default is warranted. 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.

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Theodore F. Verheggen, Chairman

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Mary Lu Jordan, Commissioner

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Robert H. Beatty, Jr., Commissioner

Distribution

Jerry Teeler, Safety Manager
Rogers Group, Inc.
P.O. Box 6437
Oak Ridge, TN 37831

Susan M. Williams, Esq.
Office of the Solicitor
U.S. Department of Labor
525 South Griffin St., Suite 501
Dallas, TX 75202

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