FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 27, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 2001-374-M
	:	A.C. No. 14-00162-05575
HEARTLAND CEMENT COMPANY	:	

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 August 21, 2001, the Commission received from Heartland Cement Company ("Heartland") 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). The Secretary of Labor does not oppose Heartland's request for relief.

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 request, Heartland, through counsel, asserts that its failure to timely submit a request for a hearing on the proposed penalty assessment to the Department of Labor's Mine Safety and Health Administration ("MSHA") was due to an internal processing error. Mot. at 1-2. It contends that at around the time it received the proposed penalty assessment, it also received seven other penalty assessments covering a total of 124 citations. *Id.* It asserts that it contested the other seven penalty assessments in a timely manner but, due to the large amount of correspondence with MSHA at that time, it inadvertently neglected to contest the penalty assessment which is the subject of its motion to reopen. *Id.* at 2-4. It explains that it only became aware of its error after it received a delinquency notice from MSHA on or about August 7, 2001. *Id.* at 1-3. Heartland attached to its request the notarized affidavit of William D. Bertie, environmental and safety engineer for Heartland, and a copy of the delinquency notice from MSHA, dated August 1, 2001. *Id.*, Exs. A & B.

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 Heartland intended to contest the proposed penalty assessment, but that it failed to do so in a timely manner due to an internal oversight. The declaration attached to Heartland's request is sufficiently reliable and supports Heartland's allegations. In the circumstances presented here, we treat Heartland's late filing of a hearing request as resulting from inadvertence or mistake. *See Lehigh Portland Cement Co.*, 22 FMSHRC 1186, 1186-88 (Oct. 2000) (granting operator's request to reopen where operator alleged its failure to timely request a hearing was due to internal processing error and operator's assertions were supported by affidavit); *Martin Marietta Aggregates*, 22 FMSHRC 1178, 1178-1180 (Oct. 2000) (granting operator's request to reopen where operator alleged that it inadvertently sent a hearing request to the wrong MSHA address and its assertions were supported by affidavit).

Accordingly, in the interest of justice, we grant Heartland's request for relief, reopen the penalty assessment that became a final order, and remand to the judge for further proceedings on the merits. The 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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_____James C. Riley, Commissioner

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_____Robert H. Beatty, Jr., Commissioner

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