

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

January 19, 1999

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

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22. : Docket No. CENT 99-91-M

: A.C. No. 03-01769-05503

TIGUE CONSTRUCTION CO., INC.

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BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Marks, Riley, Verheggen and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1994) (Mine Act). On December 28, 1998, the Commission received from Tigue Construction Company, Inc. (Tigue) a request 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). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Tigue.

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, Tigue asserts that its failure to file a hearing request to contest the proposed penalties was due to the illness of company vice-president Freddy Tigue, who the request alleges was to answer these charges. Mot. Tigue's request claims that Mr. Tigue felt chest pain and shortness of breath for two weeks prior to December 2, 1998, when he suffered from severe chest pain and was transported to a hospital. Id. The following day, Mr. Tigue underwent quadruple bypass surgery. Id. On December 17, Donny Teague, Mr. Tigue's son and president of the

company, first learned that the hearing request had not been sent. *Id.* By that time, however, the proposed assessments had become final orders of the Commission.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g., Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). 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 Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

Here, the record indicates that Tigie intended to contest the proposed penalty assessments in this matter and that, but for the serious illness of its vice-president, it would have timely submitted the hearing request and contested the proposed assessments. In these circumstances, Tigie's failure to timely file a hearing request qualifies as *inadvertence* or *mistake* within the meaning of Rule 60(b)(1). *See Kenamerican Resources, Inc.*, 20 FMSHRC 199, 201 (Mar. 1998) (granting operator's motion to reopen when operator's failure to timely file hearing request was due to the recent surgery performed on its safety director); *Peabody*, 19 FMSHRC at 1614-15 (granting operator's motion to reopen when operator failed to submit request for hearing to contest proposed penalty due to lack of coordination between counsel and personnel at mine).

Accordingly, in the interest of justice, we grant Tigues unopposed request for relief and reopen these penalty assessments that became final Commission orders. 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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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

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Robert H. Beatty, Jr., Commissioner

Chairman Jordan, dissenting:

I would remand this case to a judge for the purpose of assessing the reliability of the evidence presented by the operator as to why it did not request a hearing in a timely manner. The operator has presented its explanation to us in the form of a letter. This constitutes hearsay, which admittedly is admissible in Commission proceedings. *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1135 (May 1984). However, the question as to whether hearsay evidence is reliable or probative is a task . . . reserved to the judge's discretion in the first instance. *REB Enterprises, Inc.*, 20 FMSHRC 203, 206 (Mar. 1998). I am mindful that the operator is pro se, and that the Secretary does not object to its motion. Nonetheless, I would remand to a judge for this initial determination, which is clearly not within the province of a reviewing body.

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Mary Lu Jordan, Chairman

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