

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 4, 2002

| | | |
|------------------------|---|---------------------------|
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| v. | : | Docket No. CENT 2002-24-M |
| | : | A.C. No. 41-04158-05502 |
| KERR ENTERPRISES, INC. | : | |

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 November 28, 2001, the Commission received from Kerr Enterprises, Inc. (“Kerr”) 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).

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, Kerr, apparently proceeding pro se, asserts that it failed 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”) “because it has just been brought to our attention that these fines are due.” Mot. It also maintains that the employee who “originally signed for the green card no longer works here and in fact worked for Kerr Tractor Co., not Kerr Enterprises Inc.” *Id.* Kerr contends that the fines are excessive because the cited violations were corrected, including one that was immediately corrected and did not pose a safety problem. *Id.*

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 Kerr’s position. It is not clear from the record why Kerr did not timely return its green card. Kerr also refers in its request to “[t]he 2 penalties in question.” Mot. However, the proposed penalty assessment (A.C. No. 41-04158-05502) included three proposed penalties (Citation Nos. 06202972, 06202973, and 06202974). Proposed Penalty Assessment dated Aug. 7, 2001. Thus, it is not clear which penalties Kerr is referring to in its request. Because of this confusion and in the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See Cantera Bravo Inc.*, 23 FMSHRC 809, 809-11 (Aug. 2001) (remanding to judge where pro se operator offered no explanation for failure to timely file request for hearing); *Georges Colliers, Inc.*, 22 FMSHRC 939, 939-41 (Aug. 2000) (remanding to judge where operator misfiled proposed penalty assessment due to changes in office personnel). 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

Robert H. Beatty, Jr., Commissioner

Distribution

James Kerr, President
Kerr Enterprises, Inc.
5245 North Twin City Highway
Nederland, TX 77627

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

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