

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 7, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 2000-162-M
	:	(A.C. No. 14-01488-05510)
NORTHERN KANSAS ROCK, INC.	:	

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

ORDER

BY: Marks, Riley, and Verheggen, 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 February 28, 2000, the Commission received from Northern Kansas Rock, Inc. (“Northern Kansas”) 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 the motion for relief filed by Northern Kansas.

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 her February 18 letter, Bobbie Goebel states that she and her husband are owners of Northern Kansas and claims that it is a “Mom & Pop company.” Mot. She asserts that Northern Kansas’ failure to file a hearing request to contest the proposed penalties was due to their absence as a result of her husband’s illness. *Id.* Mrs. Goebel explains that Mr. Goebel was unable to work because of knee pain, and that Mr. and Mrs. Goebel went on vacation from December 11, 1999 to January 23, 2000. *Id.* She states that when they returned, Mr. Goebel underwent knee surgery, and that she was ill following the surgery. *Id.* Mrs. Goebel asserts that while she and Mr. Goebel were on vacation, their son signed the return receipt for the subject proposed penalty assessment on January 11, but because of the course of events that took place, they were unable to file the

hearing request prior to the 30-day deadline for filing. *Id.* As a result, the proposed penalty assessment became a final order of the Commission on February 10, 2000. Attached to the request to reopen is a copy of the hearing request dated February 17, 2000. Mrs. Goebel requests an opportunity to contest the proposed penalties. *Id.*

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, it appears that Northern Kansas intended to contest the proposed penalty assessments in this matter and that, but for the medical condition of Mr. and Mrs. Goebel, it would have timely submitted the hearing request and contested the proposed assessments. In these circumstances, Northern Kansas' failure to timely file a hearing request qualifies as "inadvertence" or "mistake" within the meaning of Rule 60(b)(1). *See Tigue Construction Co.*, 21 FMSHRC 9, 10-11 (Jan. 1999) (granting operator's request where serious illness of vice-president resulted in operator's failure to timely file); *Kenamerican Resources*, 20 FMSHRC 199, 201 (Mar. 1998) (granting operator's motion to reopen when operator's failure to timely file hearing request was due to recent surgery performed on its safety director).

Accordingly, in the interest of justice, we grant Northern Kansas' 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.

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Chairman Jordan and Commissioner Beatty, dissenting:

On the basis of the present record, we are unable to evaluate the merits of Northern Kansas' position and would remand the matter for assignment to a judge to determine whether Northern Kansas has met the criteria for relief under Rule 60(b). *See Wolf Creek Sand & Gravel*, 21 FMSHRC 1, 1-2, 3 (Jan. 1999) (remanding to judge to determine whether operator's claim that it failed to timely file due to secretary's absence as a result of husband's health problems met criteria for relief under Rule 60(b)); *Miller employed by Mid-Wisconsin Crushing Co.*, 16 FMSHRC 2384, 2385 (Dec. 1994) (remanding where the movant claimed he failed to timely file his hearing request due to secretary's absence because of her mother's terminal illness). We also note that Northern Kansas has failed to provide any affidavits or other sufficiently reliable documents to substantiate its allegations.

Mary Lu Jordan, Chairman

Robert H. Beatty, Jr., Commissioner

Distribution

Bobbie Goebel, Executive Director
Northern Kansas Rock, Inc.
P.O. Box 157
Phillipsburg, KS 67661

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