

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 4, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. KENT 2000-90
	:	A.C. No. 15-18028-03513
BR&D ENTERPRISES, INC.	:	

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

ORDER

BY: Jordan, Chairman; Riley 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 February 18, 2000, the Commission received from BR&D Enterprises, Inc. (“BR&D”), a letter requesting that the Commission 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). The Secretary of Labor does not oppose the motion for relief filed by BR&D.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary’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 the February 18 letter, Mr. Roan asserts that BR&D timely filed its hearing request on December 27, 1999, via certified mail, but that for some unknown reason it was not successfully delivered to the Civil Penalty Compliance Office at the Department of Labor’s Mine Safety and Health Administration (“MSHA”). Mot. BR&D claims that it never received the return receipt for its mailing and that it is coordinating with the U.S. Postal Service to ascertain why it was

never delivered. *Id.* BR&D attached to its February 18 letter various documents, including a U.S. Postal Service receipt for certified mail showing that BR&D mailed a package to MSHA's Civil Penalty Compliance Office in Arlington, Virginia on December 27, 1999; a letter from MSHA to BR&D dated January 4, 2000; MSHA's proposed penalty assessment and a delinquent payment notice from MSHA; and a letter dated February 18, 2000 from BR&D to MSHA's Civil Penalty Compliance Office. Attach. A-D. According to its February 18 letter to MSHA, BR&D mailed hearing requests for the proposed penalty assessment it currently seeks to reopen, along with another proposed penalty assessment in a separate case, on December 27, 1999. Mot.; Attach. A. It received a letter from MSHA dated January 4, 2000 regarding the second case. Attach. C. BR&D requests an opportunity to contest the proposed penalty assessments. Mot.

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *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 Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Drummond Co.*, 17 FMSHRC 883, 884 (June 1995).

On the basis of the present record, we are unable to evaluate the merits of BR&D's position.¹ The receipt for certified mail does not indicate what BR&D sent to MSHA's Civil Penalty Compliance Office in Arlington, Virginia. In the interest of justice, we remand the matter for assignment to a judge to determine whether BR&D has met the criteria for relief under Rule 60(b). If the judge determines that relief under Rule 60(b) is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. *See Western Aggregates, Inc.*, 20 FMSHRC 745 (July 1998) (remanding to a judge where the operator alleged that it mailed its request to the wrong MSHA office, attaching its correspondences with MSHA and a Federal Express "sender activity summary" which failed to indicate what had been sent).

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

¹ In view of the fact that the Secretary does not oppose BR&D's motion to reopen this matter for a hearing on the merits, Commissioners Marks and Verheggen conclude that the motion should be granted.

Distribution

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