FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR

WASHINGTON, D.C. 20006

January 19, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. LAKE 2000-19-M
	:	A.C. No. 11-03024-05503
SPROULE CONSTRUCTION CO., INC.	:	
	:	

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

ORDER

BY: Jordan, Chairman; 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 September 13, 1999, the Commission received from Sproule Construction Co., Inc. ("Sproule") 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 Sproule.[1]

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, Sproule requests that the Commission reopen an uncontested citation (Citation No. 7817699) that became a final order of the Commission by operation of section 105(a), and to consolidate it with a separate civil penalty proceeding involving the same operator, LAKE 99-24-M. In that proceeding, Chief Administrative Law Judge Merlin issued an Order of

---

[1] On October 21, 1999, the Commission received an opposition to Sproule's request from the Department of Labor's Regional Solicitor's Office in Chicago, Illinois. Attached to the opposition were various documents including a copy of a certified receipt for the proposed penalty associated with Citation No. 7817699. Reg. Solicitor's Exs. C, D. On December 13, 1999, the Commission received a letter from the Appellate Litigation Division of the Solicitor's Office clarifying that the Secretary does not, in fact, oppose the motion to reopen.

Default to Sproule for its failure to answer the petition for assessment of penalties for various alleged violations of mandatory health or safety standards on March 15, 1999. On March 25, 1999, Sproule filed a Motion to Vacate any and all Defaults and for Leave to File an Answer to Petition for Assessment. On April 26, 1999, the Commission issued an order vacating the default, and remanding to the judge to determine whether relief from default was warranted. 21 FMSHRC 426, 428 (April 1999) (Chairman Jordan, dissenting). On June 10, 1999, Judge Merlin issued an order on remand, vacating the default order and assigning the matter to Administrative Law Judge Jacqueline Bulluck. 21 FMSHRC 691, 692 (June 1999) (ALJ). Judge Merlin reasoned that the operator had been pro se up until the time that the default order was issued and was unfamiliar with Commission procedure, and that the operator had contacted the Department of Labor's Mine Safety and Health Administration ("MSHA") when it first received the petition and erroneously believed that such action resolved the matter. *Id.*

Sproule states in its request that it subsequently filed its Answer to the Petition for Assessment, including in the Answer its challenge to Citation No. 7817699. Mot. at 2. Sproule submits that Judge Bulluck informed it that Citation No. 7817699 was not included in the Petition for Assessment of Penalty for Docket No. LAKE 99-24-M, and that Sproule could not include its challenge to that citation in its Answer. *Id*. Accordingly, Sproule requests that the Commission consolidate Citation No. 7817699 with LAKE 99-24-M. Sproule attached to its Motion to Join various documents filed and issued in LAKE 99-24-M.

The separate proceeding, LAKE 99-24-M, has been settled. Although Sproule's motion to consolidate Citation No. 7817699 with LAKE 99-24-M is now moot, Sproule continues to challenge the citation. Accordingly, Sproule's motion to reopen Citation No. 7817699 requires resolution.

The proposed assessment for Citation No. 7817699 was received by Sproule on November 20, 1998. Reg. Solicitor's Exs. C, D. Sproule did not file a green card request for a hearing with respect to the citation, and the proposed assessment became a final order of the Commission on December 20, 1998.

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., Jim Walters Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co., Inc.*, 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 Preparation Services, 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, mistake, or excusable neglect. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

Sproule offers no explanation in its motion for the reasons that it failed to file a green card request for a hearing with respect to Citation No. 7817699. However, it appears from the record and attachments to Sproule's motion that Sproule was pro se at the time that it received the penalty proposal and that it was unfamiliar with Commission procedure. *See* Reg. Solicitor's Exs. C, D (establishing that Sproule received Citation No. 7817699 on 11-20-98); Sproule's Ex. E at 1 (judge's remand order, in which the judge found that, in November 1998, Sproule was pro se and was not familiar with Commission procedure).

In the interest of justice and in order to serve judicial economy, we grant Sproule's unopposed request for relief and reopen the penalty assessment that became a final order with respect to Citation No. 7817699. *See Turner v. New World Mining, Inc.*, 14 FMSHRC 76, 77 (Jan. 1992) (reopening final order and finding sufficient allegation that counsel misunderstood Commission procedure); *Peabody*, 19 FMSHRC at 1614-15 (reopening final order when party's failure to submit hearing request was due to unfamiliarity with Commission procedure). The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

_____
Mary Lu Jordan, Chairman

_____
Marc Lincoln Marks, Commissioner

_____
James C. Riley, Commissioner

_____
Theodore F. Verheggen, Commissioner

Commissioner Beatty, dissenting:

On the basis of the present record, I am unable to evaluate the merits of Sproule's position and would remand the matter for assignment to a judge to determine whether Sproule has met the criteria for relief under Rule 60(b). *See Dean Heywood Addison*, 19 FMSHRC 681, 682-83 (Apr. 1997) (remanding to judge to determine whether asserted lack of familiarity with Commission procedures met criteria for relief under Rule 60(b)); *REB Enterprises, Inc.*, 18 FMSHRC 311, 312-13 (Mar. 1996) (remanding where failure to file answer was claimed to be based upon lack of familiarity with Commission rules and procedures). I also note that Sproule has failed to provide any explanation for its failure to timely file a green card or to offer any affidavits to explain its position.

Robert H. Beatty, Jr., Commissioner

Distribution

Margaret Donnell, Esq.
Richard P. Reichstein, Ltd.
120 North Green St., Suite 601
Chicago, IL 60607

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