

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

April 7, 1997

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. PENN 97-93
 : A.C. No. 36-08569-03502
M & Y SERVICES, INC. :

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners¹

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) (AMine Act@). On February 27, 1997, the Commission received from M & Y Services, Inc. (AM&Y@) 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). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by M&Y.

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).

M&Y asserts that it did not timely submit its request for a hearing (AGreen Card@) to the Department of Labor 's Mine Safety and Health Administration (AMSHA@) because, despite its

¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

repeated efforts to contact MSHA to obtain information about the procedures for requesting a hearing concerning a proposed penalty assessment, it was unable to obtain assistance until the deadline for submission of its Green Card was about to expire. M&Y asserts that when it finally made contact with a MSHA representative, on January 4, 1997, it was advised to send in its appeal, even though it was late, and that there was a possibility that [MSHA] would accept it because of the holidays, vacation time and [the] continued effort to appeal these citations through the hearing process.[@] It is not clear from M&Y's request if and when M&Y returned its Green Card to MSHA. M&Y requests the Commission to reopen this matter.

The Commission has held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), it possesses jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (September 1994).

The Commission has 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 (September 1995). In accordance with Rule 60(b)(1), the Commission has previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See General Chemical Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (September 1996).

On the basis of the present record, we are unable to evaluate the merits of M&Y's position.² In the interest of justice, we remand the matter for assignment to a judge to determine whether M&Y has met the criteria for relief under Rule 60(b). If the judge determines that such

² In view of the fact that the Secretary does not oppose M&Y's motion to reopen this matter for a hearing on the merits, Commissioner Marks concludes that the motion should be granted.

relief is appropriate, this 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