

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

September 27, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. PENN 2001-162
	:	A.C. No. 36-08525-03531
PENN AMERICAN COAL, L.P.	:	

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

ORDER

BY: Jordan 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 July 5, 2001, the Commission received from Penn American Coal, L.P. (“Penn American”) 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).

On March 30, 2001, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Penn American a proposed penalty assessment for \$2350 for nineteen alleged violations. Attach. Ex. A at 2. Penn American asserts that it intended to pay the proposed penalties in the sum of \$1850 for seventeen of the alleged violations and to request a hearing on the proposed penalties for Citation Nos. 09853625 and 09853626, which each had a proposed penalty of \$250. *Id.*; Mot. Penn American states that it returned the request for a hearing to contest the proposed penalty assessment (“green card”) to MSHA, and that it mailed MSHA a

check for \$1850. Mot.; Attach. Ltr. dated April 24, 2001. Penn American further submits that it received a letter from MSHA on July 2, 2001, stating that it was delinquent in the amount of \$500. Mot. The operator attached to its request a copy of the green card and a letter dated April 24, 2001, to MSHA, stating that it enclosed payment in the amount of \$1850.

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 Penn American's position. It is unclear from the record whether the civil penalties associated with Citations Nos. 09853625 and 09853626 became final orders because MSHA erred in processing Penn American's green card or because Penn American returned the green card to an incorrect MSHA address.<sup>1</sup> 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 *Powell Mountain Coal Co.*, 23 FMSHRC 144, 144-46 (Feb. 2001) (remanding to judge where operator's failure to timely request hearing allegedly resulted from erroneous information provided by MSHA); *W. Aggregates, Inc.*, 20 FMSHRC 745, 747 (July 1998) (remanding to judge where operator alleged that it mailed hearing request to incorrect MSHA address). 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.

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Mary Lu Jordan, Commissioner

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Robert H. Beatty, Jr., Commissioner

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<sup>1</sup> There are separate addresses for corresponding with MSHA for purposes of either paying a penalty or returning a green card. It is not clear from the record whether Penn American sent its green card to the same address to which it sent payment.

Chairman Verheggen and Commissioner Riley, concurring in result:

We would grant Penn American's request for relief here because the Secretary does not oppose it, Penn American has offered a sufficient explanation to warrant relief, and no other circumstances exist that would render a grant of relief here problematic. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether Penn American has met the criteria for relief under Rule 60(b) of the Federal Rules of Civil Procedure. *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing the disposition from which relief has been sought).

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Theodore F. Verheggen, Chairman

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James C. Riley, Commissioner

Distribution

William Kokla, Asst. Safety Director  
Penn American Coal, L.P.  
P.O. Box 459  
Blacklick, PA 15716

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