

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

October 23, 2001

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

46 SAND & STONE

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Docket No. SE 2001-151-M  
A.C. No. 31-02068-05523

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

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) (“Mine Act”). On August 30, 2001, the Commission received from 46 Sand & Stone (“Forty Six Sand”) 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 Forty Six Sand’s request for relief.

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 the request, Forty Six Sand, which is represented by counsel, asserts that its failure to timely submit a request for a hearing on the proposed penalty assessment to the Department of Labor’s Mine Safety and Health Administration (“MSHA”) was due to an internal processing error. Mot. at 1-3. It contends that it received the proposed penalty assessment on approximately July 10, 2001. *Id.* at 1. It asserts that on August 29, 2001, Forty Six Sand’s president, Henry Long, discovered that the document had been misfiled. *Id.* at 1-2. It explains

that the filing was not discovered sooner because the company's safety director, who was responsible for contesting citations, had left the employment of the company. *Id.* at 2; Ex. D. at 1-2. The operator requests that the Commission reopen the assessment and permit Forty Six Sand to have a hearing on Citations Nos. 7794419, 7794420, and 7794421. Mot. at 1, 3. The operator attached to its request a copy of the proposed penalty assessment, copies of the citations, and the affidavit of Henry Long.

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).

The record indicates that Forty Six Sand intended to contest the proposed penalty assessment, but that it failed to do so in a timely manner due to an internal oversight. The affidavit attached to Forty Six Sand's request is sufficiently reliable and supports its allegations. In the circumstances presented here, we treat Forty Six Sand's late filing of a hearing request as resulting from inadvertence or mistake. *See Heartland Cement Co.*, 23 FMSHRC 1017, 1018-19 (Sept. 2001) (granting operator's request to reopen where operator alleged its failure to timely request a hearing was due to internal processing error and operator's assertions were supported by affidavit); *Lehigh Portland Cement Co.*, 22 FMSHRC 1186, 1186-88 (Oct. 2000) (same).

Accordingly, in the interest of justice, we grant Forty Six Sand's request for relief, reopen the penalty assessment that became a final order with respect to Citation Nos. 7794419, 7794420, and 7794421, and remand to the judge for further proceedings on the merits. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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Theodore F. Verheggen, Chairman

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Mary Lu Jordan, Commissioner

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James C. Riley, Commissioner

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Robert H. Beatty, Jr., Commissioner

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