FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

July 28, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
22. :	Docket No. SE 99-153-M	
	:	A.C. No. 08-00008-05572
LIMEROCK INDUSTRIES, 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 April 16, 1999, the Commission received a motion from Limerock Industries, Inc. ("Limerock") 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), and to consolidate the citation with other pending cases. Limerock had failed to timely submit a request for hearing to contest the proposed penalty assessments and pursuant to section 105(a), this proposed penalty assessment of $340 became a final order of the Commission thirty days after its receipt by Limerock. On June 10, 1999, the Secretary of Labor filed a response to Limerock's motion, stating that she does not oppose the motion to reopen this case.

In its motion, Limerock contends that its failure to timely file a hearing request to contest the proposed penalty was due to its mistaken belief that the citation at issue would automatically be consolidated with pending cases involving citations from the same inspection giving rise to the subject citation. Mot. at 2. Limerock explains that the proposed penalty was related to two sets of citations issued to it pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1). *Id.* at 1-2. Limerock states that it timely filed notices of contests of the proposed penalty assessments related to these two sets of citations in October and November 1998. *Id.* at 4-5. It contends that in January 1999 it received another citation resulting from the same inspection, but that pursuant to discussions with government counsel, it believed that it would automatically be consolidated

with the other outstanding citations. *Id*. at 5. Consequently, it did not file a notice of contest of the subject proposed penalty assessment. Limerock submitted an affidavit from its safety manager, stating that he did not file a notice contesting the subject proposed penalty because of his good faith belief that the letters he had sent contesting the other proposed penalties covered this one as well. Aff. of Gene Pollock.

The Commission has found that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), it possesses jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-90 (May 1993). The Commission has 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. *Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 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 Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996).

Here, the record indicates that Limerock intended to contest the penalty associated with Citation No. 04359421 and that, but for its reliance on MSHA's statements that all citations would be consolidated, it would have timely submitted the hearing request and contested the proposed penalty assessment. Under these circumstances, Limerock's failure to timely file a hearing request reasonably may be found to qualify as "inadvertence" or "mistake" within the meaning of Rule 60(b)(1). *See National Lime & Stone, Inc.*, 20 FMSHRC 923 (Sept. 1998) (reopening matter when operator's late filing of hearing request was caused by a mutual misunderstanding between counsel for the operator and counsel for MSHA as to need to challenge penalty assessment prior to judge's approval of parties' settlement); *Eagle Energy, Inc.*, 21 FMSHRC 13, 15 (Jan. 1999) (granting unopposed request for relief from order that became final due to a misunderstanding between the operator and an MSHA representative).

Accordingly, in the interest of justice, we grant Limerock's unopposed request for relief and reopen the penalty assessment that became a final order with respect to Citation No. 04359421. We remand the matter for assignment to a judge, who shall rule on Limerock's request to consolidate. 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 Limerock's position and would remand the matter for assignment to a judge to determine whether Limerock has met the criteria for relief under Rule 60(b). *See Randy Coal Co.*, 12 FMSHRC 1760, 1761 (Sept. 1990) (remanding final order where operator's submission reflected possible misunderstanding regarding procedures in civil penalty proceeding).

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Robert H. Beatty, Jr., Commissioner

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