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. WEST 2001-491-M
	:	A.C. No. 50-01545-05538
COMINCO ALASKA, INC.	:	

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 June 8, 2001, the Commission received from Cominco Alaska, Inc. ("Cominco") 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).

In its motion, Cominco, which is represented by counsel, asserts that it intended to contest the proposed penalty associated with Citation No. 7994028, but that its request for a hearing on the penalty was not timely filed because it inadvertently paid the assessment along with nine other assessments it intended to pay. Mot. at 1-2. Cominco asserts that it received Citation No. 7994028 on November 7, 2000, and that it filed a Notice of Contest of that citation on December 6, 2000. *Id.* at 1. Such contest was docketed under Docket No. WEST 2001-102-RM and assigned to Administrative Law Judge Richard W. Manning, who subsequently stayed

the contest proceeding pending the issuance of the proposed penalty assessment. *Id.* at 1-2. On March 21, 2001, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued the proposed penalty assessment relating to Citation No. 7994028 in the amount of $55, along with assessed penalties of $55 each for nine other citations. *Id.* at 2. Cominco asserts that it did not timely file a request for a hearing with respect to the proposed penalty for Citation No. 7994028 because, due to an internal misunderstanding and misrouting of the proposed penalty assessments, it inadvertently paid the assessment for Citation No. 7994028 when it paid the assessed penalties for the other nine citations. *Id.* Accordingly, Cominco requests the Commission to reopen the proposed penalty assessment related to Citation 7994028, which became a final order. *Id.* at 3. The operator did not provide any documents to support its assertions.

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 Cominco's position. 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 Kenamerican Res., Inc.*, 21 FMSHRC 1377, 1379 (Dec. 1999) (remanding to a judge to determine whether relief is warranted where operator's inadvertent payment of the proposed assessment was due to a processing error by its accounting department); *Westmoreland Coal Co.*, 11 FMSHRC 275, 277 (Mar. 1989) (vacating judge's dismissal of civil penalty proceeding and remanding for a determination of whether payment was a mistake). 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

Chairman Verheggen and Commissioner Riley, concurring in result:

We would grant Cominco's request for relief here. It is a matter of record that Cominco contested the citation associated with the penalty which the company subsequently and inadvertently paid. Docket No. WEST 2001-102-RM. We see few clearer indications of an operator's intention to contest a penalty than by its earlier filing of a Notice of Contest challenging the citation or order underlying the penalty subsequently proposed. We also note the Secretary does not oppose granting the relief requested.

However, in order to avoid the effect of an evenly divided decision, we join our colleagues in remanding the case to allow the judge to consider whether Cominco 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

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