FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

February 16, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 2000-118
	:	A.C. No. 46-08102-03588 A
LANDON HOLBROOK, employed by	:	
ISLAND FORK CONSTRUCTION, LTD.	:	

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

ORDER

BY: Jordan, Chairman; Beatty, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On September 29, 2000, the Commission received from Pamela Taylor, an employee of Island Fork Construction, Ltd. ("Island Fork"), on behalf of Landon Holbrook, 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 the motion for relief filed by Mr. Holbrook.

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 her letter, Ms. Taylor states that she is in charge of payroll and human resources at Island Fork. Mot. She asserts that Holbrook has been busy caring for his ill wife, who is suffering from cancer, and their two-year old daughter. *Id.* She contends that the medical costs of his wife's cancer treatment is a financial burden on Mr. Holbrook, who does not have insurance. *Id.* She explains that the employees of Island Fork have collected donations to assist

Mr. Holbrook in paying his wife's medical costs and this proposed assessment, but that they could collect only $500 of the $1,900 assessed for three violations. *Id.* Ms. Taylor requests that the proposed assessment be reduced to reflect the amount collected as payment in full. *Id.*

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g.*, *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). 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 accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Nat'l Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

On the basis of the present record, we are unable to evaluate the merits of Mr. Holbrook's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Mr. Holbrook has met the criteria for relief under Rule 60(b). *See, e.g.*, *Wolf Creek Sand & Gravel*, 21 FMSHRC 1, 1-2, 3 (Jan. 1999) (remanding where the operator claimed that it failed to timely file due to its secretary's absence as a result of her husband's health problems); *Miller employed by Mid-Wis. Crushing Co.*, 16 FMSHRC 2384, 2385 (Dec. 1994) (remanding where the movant claimed he failed to timely file his hearing request due to his secretary's absence because of her mother's terminal illness).[1] 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, Chairman

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Robert H. Beatty, Jr., Commissioner

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[1] In addition, it is unclear from the record whether, under the Commission's Procedural Rules, 29 C.F.R. §§ 2700.3 and 2700.6, Ms. Taylor is authorized to represent Holbrook in this case. Therefore, as a threshold matter, the judge should determine whether Ms. Taylor is authorized to represent him.

Commissioners Riley and Verheggen, concurring in result:

We would grant the operator's request for relief here, because the Secretary does not oppose and the operator has offered a sufficient explanation for its failure to timely respond. 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 the operator has met the criteria for relief under Rule 60(b). *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 disposition from which appeal has been sought).

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Distribution

Landon Holbrook
c/o Pamela M. Taylor
Island Fork Construction Ltd.
29501 Mayo Trail
Catlettsburg, KY 41129

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