

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 20, 2002

SECRETARY OF LABOR,	:	Docket No. WEST 2002-199-M
MINE SAFETY AND HEALTH	:	A.C. No. 02-02626-05522
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2002-200-M
v.	:	A.C. No. 02-02626-05527
	:	
ASARCO, INC.	:	Docket No. WEST 2002-201-M
	:	A.C. No. 02-02626-05533
	:	

BEFORE: Verheggen, Chairman; Jordan, 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 January 23, 2002, Asarco, Inc. (“Asarco”) filed with the Commission a Fourth Motion to Reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On June 29, August 23, and October 18, 2001, Asarco had filed motions to reopen penalty assessments that had become final orders of the Commission in Docket Nos. WEST 2001-511-M, WEST 2001-512-M and WEST 2001-513-M. On October 31, 2001, the Commission issued an order remanding the matter to an administrative law judge to determine which citations were the subject of Asarco’s motions, and whether relief from final order was appropriate. *Asarco, Inc.*, 23 FMSHRC 1136, 1138 (Oct. 2001).

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 Fourth Motion to Reopen, Asarco asserts that it intended to contest the proposed penalties with respect to nine citations, but that it did not submit a request for a hearing (“green card”) because it inadvertently paid the assessments. Mot. at 1-2, 4, 7. Asarco submits that the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued more than fifty citations to Asarco following an accident at Asarco’s Mission Underground mine, and that it filed notices of contest as to all of those citations. *Id.* at 2. Asarco states that contests of a number of those citations have been stayed pending a criminal investigation; 5 contests have been the subject of summary decision; and 33 contests remain pending. *Id.* It states that in addition to handling the litigation related to those citations, it has been involved in three discrimination cases that broadly relate to the citations. *Id.* at 2-3. Asarco explains that on January 19 and 23, 2001, Asarco personnel mistakenly paid the penalties for “some (but not all)” of the citations at issue in the pending contests because they were unaware that Asarco management was pursuing the contests. *Id.* at 3, 5-7.

Asarco explains that the nine citations that form the basis of its fourth motion were derived from two orders by Administrative Law Judge Richard Manning issued on November 7, 2001 (an order detailing the judge’s understanding of the status of the pending citations, and an order to file status report) and by its own investigation into the matter after the Commission’s remand order. *Id.* at 7-8. It states that in his first order Judge Manning identified six citations that were paid but not yet the subject of a motion to reopen.<sup>1</sup> *Id.* at 7. It notes that in the order to file status report Judge Manning identified two other citations (Nos. 7945521 and 7945732) that had been the subject of a default order. *Id.* at 7-8. Finally, Asarco submits that it identified a ninth citation, No. 7945580, which had been paid in error. *Id.* Asarco attached to its motion the declaration of Irwin P. Graham, the General Mine Supervisor at the Mission Underground mine.

On February 13, 2002, Asarco filed with the Commission a Notice of Correction. In the notice, Asarco requests that the Commission disregard that portion of its motion that refers to Citation Nos. 7945580, 7934552, 7945521, and 7945732. Notice at 2-3. It explains that Citation Nos. 7945580 and 7934552 were the subject of earlier motions to reopen, while Citations Nos. 7945521 and 7945732 were the subject of a default order that Asarco does not wish to challenge. *Id.* at 2.

On February 15, 2002, the Secretary filed a response, stating that she does not oppose Asarco’s motion to reopen. Letter from Christian Schumann, Counsel of MSHA’s Appellate Litigation, to Richard Baker, Executive Director (Feb. 15, 2002). The Secretary further submits that her decision not to oppose Asarco’s motion does not indicate that the Secretary believes that the operator has meritorious defenses to the citations in question, and that, in fact, the motion identifies no meritorious defenses. *Id.*

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<sup>1</sup> Asarco adds that three additional citations were identified in Judge Manning’s order (Citations Nos. 7934689, 7945527, and 7945737) but that they had previously been addressed in the second and third motion to reopen and in the Commission’s order of October 31, 2001. Mot. at 7.

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 Asarco intended to contest the proposed penalty assessments, but that it failed to do so due to internal mismanagement. The declaration attached to Asarco’s request appears to be sufficiently reliable and supports Asarco’s allegations of mistaken payment. Thus, while Asarco does not deny receiving the proposed assessments, its failure to submit the green cards and payment of the proposed penalty assessments can be reasonably found to qualify as “inadvertence” or “mistake.” *See Kaiser Cement Corp.*, 23 FMSHRC 374, 375 (Apr. 2001) (granting motion to reopen where operator’s inadvertent payment of the proposed assessment was due to internal processing error and operator attached affidavit supporting its allegations); *Cyprus Emerald Res. Corp.*, 21 FMSHRC 592, 593-94 (June 1999) (granting motion to reopen where operator supported its allegation that it mistakenly paid proposed penalty assessment with an affidavit). Moreover, given the clarification provided by Asarco’s Notice of Correction, it is sufficiently clear from the record which citations are the subject of Asarco’s Fourth Motion to Reopen. *Cf. Asarco*, 23 FMSHRC at 1138 (remanding where it was unclear from record which citations were the subject of the motions to reopen because operator listed twenty-three citations, but apparently paid penalties for twenty-six citations).

Accordingly, in the interest of justice, we grant Asarco's request for relief, reopen the penalty assessments that became final orders with respect to Citation Nos. 7934549, 7934550, 7934551, 7934553, and 7934662, and remand these proceedings, which on remand 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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Robert H. Beatty, Jr., Commissioner

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