

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 21, 2002

SECRETARY OF LABOR,	:	Docket Nos.	WEST 2002-367-M
MINE SAFETY AND HEALTH	:		A.C. No. 35-03526-05501
ADMINISTRATION (MSHA)	:		
	:		WEST 2002-368-M
v.	:		A.C. No. 35-03526-05502
	:		
	:		WEST 2002-369-M
APPLEGATE SHALE	:		A.C. No. 35-03526-05503

BEFORE: Verheggen, Chairman; Jordan 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 April 16, 2002, the Commission received from Applegate Shale (“Applegate”) a request to reopen three 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).

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).

Between November 2001 and January 2002, Applegate received three proposed assessments from the Department of Labor’s Mine Safety and Health Administration (“MSHA”). The assessments totaled \$620 for 10 alleged violations. In Applegate’s request for relief, Thomas Vallejo, the company’s owner, asserts that it failed to timely submit a request for a hearing on the proposed penalty assessment to MSHA due to a recalcitrant employee. Mot. Vallejo contends that his former secretary, who was delegated the task of filing the hearing requests for proposed assessments A.C. Nos. 35-03526-05501 and 35-03526-05502, assured him that she had mailed

the requests. *Id.* He explains that he only became aware that the proposed assessments were uncontested when he received the last assessment A.C. No. 35-03526-05503. *Id.* Vallejo claims that at that time, he verified with her again that she would submit the requests for all three assessments, but subsequently discovered the employee did not follow through. *Id.* Vallejo maintains that the employee, who refused to return the proposed assessments and hearing request forms to him, is no longer employed by Applegate, and that he is awaiting additional copies of the assessments from MSHA. *Id.* Vallejo also offers that business is slow and that these penalties would affect the company's ability to continue in business. *Id.*

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,” Rule 60(b) of the Federal Rules of Civil Procedure. *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). However, where an operator has failed to timely submit a hearing request due to internal mishandling, the Commission has remanded the matter to a judge for further consideration. *See, e.g., E. Ark. Contractors, Inc.*, 21 FMSHRC 981, 983 (Sept. 1999) (remanding where operator failed to timely file hearing request due to a change in personnel which resulted in mishandling of the proposed penalty assessment).

On the basis of the present record, we are unable to evaluate the merits of Applegate's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Webster has met the criteria for relief under Rule 60(b). 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.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen, dissenting:

I would grant Applegate Shale's request for relief and reopen these penalty assessments. Applegate has provided a reasonable explanation for its failure to timely request a hearing which I find qualifies as "inadvertence" or "mistake" under Rule 60(b) of the Federal Rules of Civil Procedure. I also note that the Secretary does not oppose the operator's motion. In addition, the operator is proceeding pro se, and the Commission has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Under these circumstances, and because no other circumstances exist that would render a grant of relief here problematic, I fail to see the need or utility for remanding this matter to determine if relief would be appropriate. I therefore dissent.

Theodore F. Verheggen, Chairman

Distribution

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