

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

July 23, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket No. WEST 2002-429-M
	:	A.C. No. 02-00144-05577
PHELPS DODGE SIERRITA, INC.	:	

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 July 1, 2002, the Commission received a request from Phelps Dodge Sierrita, Inc. (“Phelps Dodge”) filed by counsel 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. *Id.*

Phelps Dodge asserts that it intended to contest the proposed penalty associated with Citation No. 7949365, but that it did not submit a green card because it inadvertently paid the assessment along with fourteen other assessments it intended to pay, which were proposed by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) at the same time. Mot. at 2. Phelps Dodge asserts that it received Citation No. 7949365 on January 24, 2002, and that it filed a Notice of Contest of that citation on February 22, 2002. *Id.* at 1. The contest was assigned Docket No. WEST 2002-239-RM, and is currently on stay before Administrative Law Judge August Cetti. *Id.* On May 10, 2002, MSHA issued proposed assessments of \$1,327 for fifteen citations, including \$55 for Citation No. 7949365. *Id.* at 2. Phelps Dodge asserts that it erroneously paid the proposed penalty for Citation No. 7949365 because of “an internal

misunderstanding and confusion over the status of the citations at issue.” *Id.* Attached to Phelps Dodge’s request is the affidavit of Joe Mortimer, the safety and health manager for the Sierrita Mine. Ex. A. Phelps Dodge requests relief under Rule 60(b) of the Federal Rules of Civil Procedure.

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).

The record reflects that Phelps Dodge intended to contest the penalty related to Citation No. 7949365 and that, but for apparent confusion on the operator’s part, it would have returned the green card and contested the proposed penalty assessment. The most compelling indication of Phelps Dodge’s intention to contest this penalty is the notice of contest it filed concerning Citation No. 7949365 in Docket No. WEST 2002-239-RM. In addition, Phelps Dodge has adequately supported its allegations in the affidavit of Mortimer. We find that Phelps Dodge has provided a reasonable and well-supported explanation for its failure to contest the proposed penalty, demonstrating “inadvertence” or “mistake” under Rule 60(b). We also note that the Commission has granted a request to reopen where the operator contested a citation, but then mistakenly paid the penalty associated with the citation. *Doe Run Co.*, 21 FMSHRC 1183, 1184-85 (Nov. 1999). The Commission has also granted an operator’s motion to reopen where the operator inadvertently paid the penalty assessment when the operator submitted documents supporting its allegations. *See Cyprus Emerald Res. Corp.*, 21 FMSHRC 592, 593-94 (June 1999).

Accordingly, in the interest of justice, we grant Phelps Dodge's request to reopen, reopen the penalty assessment that became a final order, and remand to the Chief Administrative Law Judge for further proceedings on the merits. The case 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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