FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 28, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 2001-340-M
	:	A.C. No. 03-00855-05532 A
JUSTIN DEES, employed by	:	
ROGERS GROUP, 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 July 6, 2001, the Commission received from Rogers Group, Inc. ("Rogers Group") 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 penalty assessment proposed a civil penalty for a citation issued pursuant to section 110(c) of the Mine Act, 30 U.S.C. § 820(c), to Justin Dees, an employee of Rogers.

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 request submitted by Ed Elliott, Rogers Group's Safety Director, Rogers Group states that it is requesting relief to reopen the penalty assessment in order to provide information regarding the citation issued to Dees. Mot. Elliott states that on November 8, 2000, Dees received a proposed penalty assessment of $750. *Id.* He further submits that Rogers Group requested an informal conference with the Department of Labor's Mine Safety and Health Administration ("MSHA"), which was subsequently held on December 15, 2000. *Id.* Elliott

states that on February 8, 2001, Dees received the final proposed assessment of $750, and then contacted Elliott. *Id.* Elliott explains that he subsequently informed an MSHA District Manager that Rogers Group wished to contest the citation issued to Dees, but that it could not until it contested the "original citation" that acted as a basis for the citation issued to Dees. *Id.* Elliott states that Rogers Group eventually settled the underlying citation, which apparently involved a modification of the citation from one issued under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), to one issued under section 104(a) of the Mine Act, 30 U.S.C. § 814(a). He states that Rogers Group believes that "there was no unwarrantable failure on the part of [Dees] to violate a regulation . . . [which] was borne out in the final agreement on the original citation." *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," 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 Rogers Group's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Rogers Group has met the criteria for relief under Rule 60(b). *See, e.g.*, *Ogden Constructors*, 22 FMSHRC 1 (Jan. 2000) (remanding where the operator mistakenly believed that proceeding was suspended during MSHA investigation); *Holbrook, emp. by Island Fork Constr., Ltd.*, 23 FMSHRC 158, 159 (Feb. 2001) (remanding where fellow employee claimed named individual failed to timely file due to wife's 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, Commissioner

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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, Rogers Group is authorized to represent Dees in this case. Therefore, as a threshold matter, the judge should determine whether Rogers Group is authorized to represent him. *See Holbrook*, 23 FMSHRC at 159 n.1.

Chairman Verheggen and Commissioner Riley, concurring in result:

We would grant Dees' request for relief because the Secretary does not oppose it, Dees has set forth (through Rogers Group's Safety Director Ed Elliott) sufficiently compelling circumstances to warrant relief, and no other circumstances exist that would render a grant of relief here problematic. However, in order to avoid the effect of an evenly divided decision, we join our colleagues in remanding the case. *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).

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

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