FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

June 21, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 99-263-M
	:	A.C. No. 45-03086-05511
GOOD CONSTRUCTION	:	

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

ORDER

BY: Jordan, Chairman; Riley, 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 May 4, 1999, the Commission received from Good Construction 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). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Good Construction.

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, Good Construction maintains that it failed to timely file a request for a hearing ("green card") for the proposed penalty associated with Citation No. 7962496 because it never received the green card. Mot. at 2. The operator submits that the subject citation was one of five citations that it contested, and that the contest proceedings were stayed pending initiation of associated civil penalty proceedings. *Id.* at 1. Good Construction states that civil penalty proceedings were initiated involving four of the citations. *Id.* It explains that, in response to an

order issued by Administrative Law Judge Richard Manning requesting the status of the proposed penalty assessment relating to the fifth citation, the Secretary responded that she had not yet issued a proposed penalty. *Id.*; Exs. 4, 5. The operator states that, in response to a subsequent order by the judge, Good Construction requested a hearing on the contest proceedings and on the civil penalty proceedings related to the four citations. Mot. at 2; Exs. 6, 7. The operator submits that, on December 7, 1998, a proposed assessment for the fifth citation was mailed to it, but that Good Construction never received it. Mot. at 2. It states that, after it was informed on February 24, 1999 that it was delinquent in paying the penalty, it subsequently corresponded and telephoned the Department of Labor's Mine Safety and Health Administration ("MSHA") regarding the matter. *Id.* Among other documents, the operator attached to its motion a memorandum from MSHA, stating that the penalty petition had been delivered to Good Construction on many occasions, but that it was never claimed by the operator. Ex. 10.

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). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-90 (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 Preparation 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 National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

On the basis of the present record, we are unable to evaluate the merits of Good Construction's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Good Construction has met the criteria for relief under Rule 60(b). *See Gary Klinefelter*, 19 FMSHRC 827, 828 (May 1997) (remanding for determination of whether relief from final order warranted where unclear why individual did not receive proposed penalty); *Waste Coal Management, Inc.*, 14 FMSHRC 423, 423-24 (Mar. 1992) (remanding where default order sent by certified mail may not have been received by operator). 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, Chairman

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioners Marks and Verheggen, dissenting:

Good Construction has alleged that it never received the penalty proposal associated with Citation No. 7962496. Mot. at 2. The Secretary of Labor has not disputed any of the facts set forth in Good Constructions's motion, and, in fact, does not oppose the motion. On the basis of the present record, we would grant Good Construction's request for relief. *See Harvey Trucking*, 21 FMSHRC __, slip op. at 4, No. WEVA 99-87 (June 11, 1999) (Commissioners Marks and Verheggen, dissenting).

Marc Lincoln Marks, Commissioner

Theodore F. Verheggen, Commissioner

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