

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 21, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
22.	:	Docket No. WEVA 99-90
	:	A.C. No. 46-08702-03507
UNIQUE MINING, INC.	:	

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

ORDER

BY: Jordan, Chairman; Marks, Riley, and Verheggen, 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 14, 1999, the Commission received from Unique Mining, Inc. (“Unique”) a request to reopen four penalty assessments, totaling \$200,000, that had become final orders 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 Unique.

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 motion, Unique contends that its failure to timely file a hearing request to contest the proposed penalties (“green card”) was due to a misfiling by its accounting firm. Mot. at 2. Unique explains that the proposed penalties were related to one citation (Citation No. 7160503) and three orders (Order Nos. 7160505, 4203791, and 4203792) issued to it pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1). *Id.* at 1. Unique states that it timely filed notices of contest of the underlying citation and orders, and that the contest proceedings were stayed

pending the initiation of the associated civil penalty proceedings. *Id.* It submits that on May 3, 1999, the Department of Labor's Mine Safety and Health Administration ("MSHA") contacted Unique's counsel, and informed her that the proposed penalties had not been paid or contested. *Id.* at 2. Unique contacted its accounting firm, which is responsible for picking up and sorting Unique's mail. *Id.* at 1-2. Unique states that its accounting firm discovered that the proposed penalties had not been entered into its computer system and that the missing green card had mistakenly been attached to an unrelated green card and, therefore, was not visible. *Id.* at 2. Attached to the motion are affidavits by the office manager of Unique's accounting firm and Unique's president, and a copy of the subject green card. Exs. A, B, C.

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 Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *RB Coal Co.*, 17 FMSHRC 1110, 1111 (July 1995).

Here, the record indicates that Unique intended to contest the penalties associated with Citation No.7160503 and Order Nos. 7160505, 4203791, and 4203792 and that, but for the misfiling by its accounting firm, it would have timely submitted the hearing request and contested the proposed penalty assessments. In these circumstances, Unique's failure to timely file a hearing request reasonably may be found to qualify as "inadvertence" or "mistake" within the meaning of Rule 60(b)(1). *See Kenamerican Resources, Inc.*, 20 FMSHRC 199, 200-01 (Mar. 1998) (reopening proceedings when green card was not timely filed due to operator's internal processing error).

Accordingly, in the interest of justice, we grant Unique's unopposed request for relief and reopen the penalty assessments that became final orders with respect to Citation No.7160503 and Order Nos. 7160505, 4203791, and 4203792. 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, Chairman

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

Commissioner Beatty, dissenting:

On the basis of the present record, I am unable to evaluate the merits of Unique's position and would remand the matter for assignment to a judge to determine whether Unique has met the criteria for relief under Rule 60(b). *See Benton County Stone, Inc.*, 21 FMSHRC 5, 7 (Jan. 1999) (remanding final order when operator misfiled green card).

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Robert H. Beatty, Jr., Commissioner

Distribution

Mark E. Heath, Esq.  
Heenan, Althen & Roles  
P.O. Box 2549  
Charleston, WV 25329-2549

Sheila Cronan, Esq.  
U.S. Department of Labor  
Office of the Solicitor  
4015 Wilson Blvd., Suite 400  
Arlington, VA 22203

Chief Administrative Law Judge Paul Merlin  
Federal Mine Safety and Health Review Commission  
1730 K Street, N.W., Suite 600  
Washington, D.C. 20006