

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

July 29, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 99-102
	:	A.C. No. 46-06051-03747
CANNELTON INDUSTRIES, 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 June 3, 1999, the Commission received from Cannelton Industries, Inc. (“Cannelton”) 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).<sup>1</sup> The Secretary of Labor did not file an opposition to Cannelton’s motion.

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).

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<sup>1</sup> The Commission originally received Cannelton’s motion in November, 1998. However, because the operator placed on its motion the docket number of the related contest proceeding already assigned to Administrative Law Judge Jacqueline Bulluck, the motion was forwarded to Judge Bulluck. Cannelton’s motion again came to the Commission’s attention when MSHA faxed a copy of the motion to the Commission after attempting to collect the civil penalty from Cannelton.

In its request, Cannelton asserts that its failure to file a hearing request to contest the proposed penalty for the violation alleged in Citation No. 7160486 was due to circumstances related to its impending sale. Mot. at 3. Cannelton states that it timely filed a notice of contest of the underlying citation. *Id.* at 2. Cannelton alleges that its impending sale had been known for several months and that numerous people left Cannelton's employment and, as a result, job duties shifted among the remaining employees. *Id.* at 3. Cannelton submits that the duties of Joyce Alderson, the employee who normally handled safety matters, were assigned to another employee. *Id.* The operator maintains that it did not learn until it received a delinquency notice that the notice of proposed penalty had been inadvertently filed rather than paid or contested. *Id.* Cannelton also requests that this matter and the related contest proceeding, Docket No. WEVA 98-99-R, be consolidated. *Id.* at 2. Attached to the motion are a copy of Cannelton's request for hearing, a news article discussing Cannelton's sale, and an affidavit by Alderson. 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). *See, e.g., Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (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 Unique Mining, Inc.*, 21 FMSHRC 602, 602-04 (June 1999) (granting operator's motion to reopen where operator timely filed notice of contest, but operator's accounting firm misfiled and failed to timely contest the related proposed penalties); *Kenamerican Resources, Inc.*, 20 FMSHRC 199, 200-01 (Mar. 1998) (reopening proceedings when green card not timely filed due to operator's internal processing error).

Here, the record indicates that Cannelton intended to contest the penalties associated with Citation No. 7160486, and that, but for the misfiling, it would have timely submitted the hearing request. In these circumstances, Cannelton'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*, 20 FMSHRC at 200-01.

Accordingly, the interest of justice, we grant Cannelton's unopposed request for relief and reopen the penalty assessment that became a final order with respect to Citation No. 7160486. We also remand this matter for assignment to a judge to determine whether its consolidation with the underlying contest proceeding pending before Judge Bulluck, Docket No. WEVA 98-99-R, 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, 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 Cannelton's position and would remand the matter for assignment to a judge to determine whether Cannelton 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

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