

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 11, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2000-104-M
	:	A.C. No. 46-01563-05558
v.	:	
	:	
MARTIN MARIETTA AGGREGATES	:	

BEFORE: Jordan, Chairman; Riley, Verheggen, 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 August 21, 2000, the Commission received from Martin Marietta Aggregates (“Martin Marietta”) 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 Secretary of Labor does not oppose the motion for relief filed by Martin Marietta.

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, Martin Marietta asserts that its failure to file a hearing request to contest the proposed penalty for Citation No. 7728476 was due to a processing error made by its accounts payable department. Mot. at 2. The penalty assessment in question was issued to Martin Marietta, along with three other penalty assessments for other violations. *Id.* at 1. Martin Marietta alleges that while it intended to pay the penalty assessments for the three other violations, it intended to contest the penalty assessment for Citation No. 7728476. *Id.* Martin Marietta states that its accounts payable department apparently sent payment of the three single

penalty assessments,¹ along with a hearing request to contest the penalty assessment for Citation No. 7728476, to MSHA's regional office in Pittsburgh, Pennsylvania, rather than separately filing the request with MSHA's Assessment Office. *Id.* at 1-2. Martin Marietta claims that it learned of this misfiling when George Hospodar, Martin Marietta's Safety Engineer, called MSHA's Assessment Office to check on the status of the penalty proceeding and was informed that MSHA did not receive its hearing request and had issued a letter demanding payment. *Id.* at 2; Ex. A. Martin Marietta asks the Commission to reopen the final order pursuant to Rule 60(b)(1) and allow the contest to proceed to hearing. Mot. at 2-3. Attached to its request is a notarized statement from Darrell Casto. Ex. A.

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., Jim Walters Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co., Inc.*, 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 Preparation Services, 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, mistake, or excusable neglect. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

The record indicates that Martin Marietta intended to contest the proposed penalty, but that it failed to do so because it mailed its green card to the wrong MSHA office. The notarized statement attached to Martin Marietta's request appears to be sufficiently reliable and supports Martin Marietta's allegations. *See* Ex. A. In the circumstances presented here, Martin Marietta's late filing of a hearing request may be considered inadvertence or excusable neglect within the meaning of Rule 60(b)(1). *See Chantilly Crushed Stone, Inc.*, 22 FMSHRC 17, 19 (Jan. 2000) (granting operator's request for relief where operator provided reliable documentation to support its allegation that it timely mailed hearing request); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996) (granting operator's motion to reopen when operator had reasonable basis for believing that it timely mailed its hearing request and when any late filing was due to unique mail service at mine).

¹ In its motion, Martin Marietta claims that it submitted a check for \$427 for payment of Citation Nos. 7728473, 7728474, and 7728475 under A.C. No. 46-01563-05558. Mot. at 1-2. However, the three penalties were assessed respectively for \$224, \$161, and \$55, totaling \$440. *Id.* at 1. In Darrell Casto's statement, he explains that Martin Marietta's accounts payable department submitted a check for \$867 for payment of penalties totaling \$440 in A.C. No. 46-01563-05558, and \$427 for payment of penalties in A.C. No. 46-00001-05560, which is an unrelated matter. Ex. A.

Accordingly, in the interest of justice, we reopen this penalty assessment that became a final order with respect to Citation No. 7728476, and remand to the 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.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

Laura E. Beverage, Esq.
Jackson & Kelly, PLLC
1660 Lincoln Street, Suite 2710
Denver, CO 80264

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006