

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 9, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. CENT 2000-299
	:	and 2000-300
GEORGES COLLIERS, INCORPORATED	:	

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 June 5, 2000, the Commission received from Georges Colliers, Inc. a request to reopen two penalty assessments that had become final orders 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 Georges Colliers.

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 so notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its motion, Georges Colliers contends that it intended to file hearing requests because it is experiencing financial hardship and, as a matter of policy, has contested all proposed penalties. Mot. at 1. It asserts that it submitted financial documents to the Department of Labor’s Mine Safety and Health Administration’s Civil Penalty Compliance Office and was indirectly notified that that office notified the Regional Solicitor’s Office that Georges Colliers was entitled to financial hardship consideration. *Id.* at 2. Georges Colliers contends that it either misplaced or misfiled the proposed assessments due to changes in office clerks during the time it received the proposed penalty assessments or that the Civil Penalty Compliance Office lost its hearing request. *Id.* Georges Colliers requests that the Commission reopen the proposed penalty assessments in

the subject proceedings. Georges Colliers attached to its motion copies of the notices of proposed penalty assessments and a demand letter for payment of the penalties from MSHA.<sup>1</sup> Attachs.

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., Essayons, Inc.*, 20 FMSHRC 786, 788 (Aug. 1998) (remanding final order when operator misplaced proposed penalty notification); *Del Rio, Inc.*, 19 FMSHRC 467, 468 (Mar. 1997) (remanding final order when operator inadvertently misfiled hearing request card); *RB Coal Co.*, 17 FMSHRC 1110, 1111 (July 1995) (remanding final order when operator misplaced hearing request card). 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); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

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<sup>1</sup> Although Georges Colliers alleges that it may have misplaced or misfiled the proposed penalty assessments, it appears that it subsequently obtained or retrieved copies to submit as attachments to its motion. However, Georges Colliers fails to explain the circumstances of when or how it obtained such copies.

On the basis of the present record, we are unable to evaluate the merits of Georges Colliers' position.<sup>2</sup> The documents attached to Georges Colliers' motion do not substantiate its allegations that it misplaced or misfiled the proposed penalty assessments or that MSHA misplaced its hearing request. In the interest of justice, we remand the matter for assignment to a judge to determine whether Georges Colliers has met the criteria for relief under Rule 60(b). *See BR&D Enterprises, Inc.*, 22 FMSHRC 479, 481 (Apr. 2000) (remanding where operator claimed it timely sent hearing request, but never received return receipt and, in support, attached copies of correspondences between it and MSHA and a certified mailing receipt which did not indicate the document sent) and *East Arkansas Contractors, Inc.*, 21 FMSHRC 981, 981-82 (Sept. 1999) (remanding where operator failed to file hearing request because of a change in personnel responsible for handling such matters and ensuing mishandling of the proposed penalty notice). *Compare Chantilly Crushed Stone, Inc.*, 22 FMSHRC 17, 17-18 (Jan. 2000) (granting operator's request to reopen where operator claimed its hearing request was late due to mail delays beyond its control and submitted affidavit, copy of the green card, and a letter from MSHA in support). 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, Chairman

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James C. Riley, Commissioner

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Robert H. Beatty, Jr., Commissioner

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<sup>2</sup> In view of the fact that the Secretary does not oppose Georges Colliers' motion to reopen this matter for a hearing on the merits, Commissioners Marks and Verheggen conclude that the motion should be granted.

Distribution

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