# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**1730 K STREET NW, 6TH FLOOR**

**WASHINGTON, D.C. 20006**

January 20, 2000

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. VA 2000-14-M |
| | : | A. C. No. 44-00024-05531 |
| CHANTILLY CRUSHED STONE, INC. | : | |

BEFORE: Jordan, Chairman; Marks, 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 January 10, 2000, the Commission received from Chantilly Crushed Stone, Inc. ("Chantilly"), a request to reopen 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 request filed by Chantilly.

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, Chantilly states that the proposed penalty assessments associated with Citation Nos. 7725030, 7725031, 7725032, 7725034, and 7725036 became final orders of the Commission due to delays at the U.S. Postal Service. Mot. at 1-2. It explains that the proposed penalty assessments were received by its mine on October 15, 1999, and subsequently forwarded to its safety director, Steven Herzberg, on October 22. *Id.* at 1. Chantilly submits that Herzberg returned the request for a hearing (green card) by first class mail on November 15, 1999. *Id.* It explains that, due to inexplicable mail delays, perhaps attributable to increased mail volume during the holidays, the hearing request was not received by the Department of Labor's Mine

Safety and Health Administration ("MSHA") until December 6, 1999. *Id.* at 1-2. Chantilly states that, in a letter dated December 29, 1999, MSHA notified Chantilly of the final orders, stating that the hearing request had been mailed by Chantilly on December 2, 1999, outside of the 30-day filing period. *Id.* at 2 n.3. Chantilly maintains that any delay in postmarking was outside of its control. *Id.* Accordingly, Chantilly requests that the Commission reopen the final orders on the basis of mistake or inadvertence pursuant to Fed. R. Civ. P. 60(b). Chantilly attached to its request an affidavit by Herzberg, the December 29 MSHA letter, and a copy of the green card.

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *see also Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We also have 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 previously have 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).

The record indicates that Chantilly intended to contest the proposed penalties, and that it may have timely filed its request for a hearing. The documents attached to Chantilly's request appear to be sufficiently reliable and support Chantilly's allegations. *See* Ex. A (Aff. of Steven Herzberg); Ex. C (green card signed by Herzberg and dated Nov. 15, 1999). In the circumstances presented here, any late filing of Chantilly's hearing request may be considered inadvertence or excusable neglect within the meaning of Rule 60(b)(1).[1] *See 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 view of the fact that the Secretary does not oppose Chantilly's motion to reopen this matter for a hearing on the merits, Commissioners Marks and Verheggen would grant the motion.

Accordingly, in the interest of justice, we reopen this penalty assessment that became a final order with respect to Citation Nos. 7725030, 7725031, 7725032, 7725034, and 7725036.[2] 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

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

[2] Commissioner Beatty votes to grant Chantilly's motion to reopen because it is supported by an affidavit.

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