

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 28, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2005-116-M
Petitioner	:	A. C. No. 19-01114-56147
v.	:	
	:	
R.J. CINCOTTA CO., INC.,	:	Mine: Portable Crusher
Respondent	:	

ORDER TO RESPONDENT TO SUBMIT SUPPORTING DOCUMENTATION

This case is before me pursuant to an order of the Commission dated February 6, 2006, remanding this matter for further consideration and determination as to whether the operator, R.J. Cincotta Company, Inc., (“Cincotta”) is entitled to relief under Rule 60(b) of the Federal Rules of Civil Procedure.¹ In particular, Rule 60(b)(1) provides relief from a final judgment in cases where there has been a “mistake, inadvertence, surprise, or excusable neglect.” Fed. R. Civ. P. 60(b)(1).

This matter arose because Cincotta did not file a timely answer to the Secretary of Labor’s (“Secretary”) penalty petition or to my August 18, 2005 show cause order. When I did not receive a response to the show cause order, I issued a default order on November 2, 2005, in which I directed Cincotta to pay the proposed penalty assessment. In support of its request, Cincotta, appearing *pro se*, claims it never received the default and that it “never heard back for [sic] an order to the respondent to show cause.” Resp’t Mot. The Secretary indicates that she does not oppose Cincotta’s request.

The Commission has stated that default is a harsh remedy, and if the defaulting party makes a showing of adequate or good cause for failing to timely respond, the case may be reopened. *Coal Prep. Services, Inc.*, 17 FMSHRC 1529, 1530 (Sept.1995). In addition, the Commission has held pleadings drafted by *pro se* litigants to a less stringent standard than that applied to documents drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992)(citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). However, based upon the record before me, I am unable to determine whether Cincotta has adequate cause for failing to timely file its notice of contest. The record includes certified return receipts signed by a company representative indicating Cincotta’s receipt of both the show cause and default orders.

¹While the Commission is not obligated to adhere to the Federal Rules of Civil Procedure, the Commission has found guidance and has applied “so far as practicable” Rule 60(b). 29 C.F.R. § 2700.1(b).

Accordingly, Cincotta is **ORDERED** to address the issue of why it failed to file a timely notice of contest, particularly in light of its receipt of the show cause order, within 20 days of the date of this order. If Cincotta restates its claim of not having received the show cause order, it must explain why this Commission should not consider the enclosed certified return receipts as proof of its receipt of the show cause order. Cincotta must send sworn statements attesting to the veracity of its claim.

Robert J. Lesnick
Chief Administrative Law Judge

Enc.

Distribution: (Certified)

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