FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 17, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. KENT 2001-230
	:	A.C. No. 15-17717-03536 A
VESTER OSBORNE	:	

BEFORE: Verheggen, Chairman; Jordan, Riley, and Beatty, Commissioners

ORDER

BY: Jordan 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 April 9, 2001, the Commission received from Vester Osborne ("Osborne") 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).

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).

Osborne was cited for three violations under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), and failed to file a timely request for a hearing. Proposed Penalty Assessment (June 12, 2000). He states that at the time of the cited violations, he was working as the supervisor of Stanley Osborne's Sister Bear Mine. Mot. He asserts that, when he received the proposed penalty assessment for the cited violations, he gave it to Stanley Osborne, the owner of his former place of employment, who said he would "take care of it." *Id.* Osborne contends that he

is unable to pay the $5825.67 penalty and should not be responsible for paying it because Stanley Osborne agreed to pay it. *Id.* He requests that the Commission reopen this matter. *Id.*

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 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 Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. 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 Gen. Chem. Corp.,* 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

The Commission has previously remanded a request to reopen where a defaulting party has claimed that another party is responsible for paying the penalties at issue, but the defaulting party also alleges an intention to contest those penalties. *See JEN Inc.*, 16 FMSHRC 2402 (Dec. 1994) (remanding a request to reopen where JEN indicated that it intended to contest the penalties at issue although it contended that the owner of the mine, and not JEN, was responsible for paying the penalty). The Commission has denied such a request, however, when a company has alleged that another party is responsible for paying the penalty, but fails to allege an intention to contest the penalty at issue. *See Sterling Sand & Gravel Co.*, 22 FMSHRC 935 (Aug. 2000) (denying request to reopen because the operator did not allege its intention to contest the penalty at issue but only asserted that it was not responsible for paying the penalty).

Here, Osborne appears to indicate that he would contest the penalty by stating that he is unable to pay it. Mot. Further, by asserting that he thought Stanley Osborne was handling the penalty matter, Osborne has provided a reason for not filing a timely request for a hearing. *Id.* Finally, because Osborne is apparently proceeding without the benefit of counsel, his request may be held to a less stringent standard than pleadings filed by counsel. *See Dykhoff v. U.S. Borax, Inc.*, 21 FMSHRC 1279, 1280-81 (Dec. 1999) (recognizing that Commission has held pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys); *Rostosky Coal Co.*, 21 FMSHRC 1071, 1072 (Oct. 1999) (same).

On the basis of the present record, we are unable to evaluate the merits of Osborne's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See JEN*, 16 FMSHRC at 2402-03. 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, Commissioner

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Robert H. Beatty, Jr., Commissioner

Chairman Verheggen and Commissioner Riley, concurring in result:

We would grant the operator's request for relief here. As our colleagues state so convincingly: "Here Osborne appears to indicate that he would contest the penalty by stating that he is unable to pay it. Further, by asserting that he thought Stanley Osborne was handling the penalty matter, Osborne provided a reason for not filing a timely request for a hearing." Slip op. at 2. Our colleagues also correctly point out that Osborne is appearing pro se, and that the Commission has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Id.*; *see Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Moreover, the Secretary does not oppose Osborne's motion.[1] We are thus mystified that our colleagues are "unable to evaluate the merits of Osborne's position." Slip op. at 3.

Nevertheless, in order to avoid the effect of an evenly divided decision, we reluctantly join our colleagues in remanding the case. *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).

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Theodore F. Verheggen, Chairman

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James C. Riley, Commissioner

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[1] The Secretary does contend, and we agree, that if Osborne does not contest the penalty after it is presumably reopened, or contests the penalty but loses his contest, he will be legally responsible for paying whatever penalty is finally assessed. *See* Sec'y Letter (Apr. 13, 2001). We also agree with the Secretary that any agreement by Stanley Osborne to pay the penalty is a matter between Vester Osborne and Stanley Osborne and does not affect Vester Osborne's ultimate responsibility for ensuring that any penalty, if assessed, is paid. *See id.*

Distribution

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