

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

July 10, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2002-142
v.	:	A.C. No. 36-08273-03510
	:	
PIONEER AGGREGATES, INC.	:	

BEFORE: Verheggen, Chairman; Jordan 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 May 16, 2002, the Commission received from Pioneer Aggregates, Inc. (“Pioneer”) 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).

In its request, Pioneer asserts that it did not submit a request for a hearing because it did not receive the proposed penalty assessment from the Department of Labor’s Mine Safety and Health Administration (“MSHA”). Mot. It contends that, although the proposed penalty assessment contains Pioneer’s correct address, the assessment was returned to MSHA as undeliverable. *Id.* Pioneer attached to its request a copy of MSHA’s delinquency letter dated May 8, 2002, and a copy of the proposed penalty assessment which it received by fax on May 13, 2002. *Id.*, Attachs.

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,” Rule 60(b) of the Federal Rules of Civil Procedure. *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).

On the basis of the present record, we are unable to evaluate the merits of Pioneer’s position. While Pioneer claims that it did not receive the proposed penalty assessment, the reasons for and circumstances surrounding that alleged non-receipt are not clear from the record. 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 John Richards Constr.*, 22 FMSHRC 1054, 1054-55 (Sept. 2000) (remanding where operator did not provide support for its allegation that it did not receive proposed penalty assessment); *Warrior Inv. Co., Inc.*, 21 FMSHRC 971, 971-73 (Sept. 1999) (same). 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.

---

Theodore F. Verheggen, Chairman

---

Mary Lu Jordan, Commissioner

---

Robert H. Beatty, Jr., Commissioner

Distribution

Tom Nilon  
Pioneer Aggregates, Inc.  
202 Main Street  
Laflin, PA 18702

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
1100 Wilson Blvd., 22<sup>nd</sup> Floor  
Arlington, VA 22209

Myra James, Chief  
Civil Penalty Compliance Office  
U. S. Department of Labor  
1100 Wilson Blvd., 25<sup>th</sup> Floor  
Arlington, VA 22209

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