FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 22, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. SE 2001-107-M
CANTERA BRAVO INC.	:	

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 20, 2001, the Commission received from Cantera Bravo Inc. ("Cantera") 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, Cantera, appearing pro se, asserts various reasons why the Department of Labor's Mine Safety and Health Administration ("MSHA") should not have issued the citations (Citation Nos. 07797264, 07797265, 07797266, and 07797267) against it that resulted in the penalty assessment at issue. Mot. It requests that the penalties be dropped but offers no explanation for its failure to timely file a request for a hearing. *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).

On the basis of the present record, we are unable to evaluate the merits of Cantera's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Cantera has met the criteria for relief under Rule 60(b). *See Collier Stone*, 22 FMSHRC 483, 483-84 (Apr. 2000) (remanding to judge where pro se operator offered inadequate explanation for its failure to file a timely request for a hearing); *Bailey Sand & Gravel Co.*, 20 FMSHRC 946, 946-47 (Sept. 1998) (remanding to judge where pro se operator offered no explanation for its failure to contest the penalty assessment). 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. First, we note that the Secretary does not oppose Cantera's motion. We also note that Cantera is proceeding pro se, and the Commission has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Because Cantera, which is located in Puerto Rico, submitted its motion to reopen in Spanish (subsequently translated into English), language factors may have contributed to its failure to fully explain why it did not file a timely request for a hearing. Nor do we find any other circumstances that would render a grant of relief here problematic. Under these circumstances, we thus fail to see the need or utility for remanding this matter.

Nevertheless, in order to avoid the effect of an evenly divided decision, we 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

Distribution

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