

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

January 17, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2002-20-M
v.	:	A.C. No. 45-03220-05517
	:	
CASCADE SAND & GRAVEL,	:	
INCORPORATED	:	

BEFORE: Verheggen, Chairman; Jordan 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 October 1, 2001, the Commission received from Cascade Sand & Gravel, Inc. (“Cascade”) 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, Cascade, apparently proceeding pro se, asserts that it failed to timely submit a request for a hearing on the proposed penalty assessment to the Department of Labor’s Mine Safety and Health Administration (“MSHA”) because it misplaced its copy of the proposed penalty assessment. Mot. Cascade attached a copy of the proposed penalty assessment to its request to reopen and a copy of the certified mail receipt indicating that Cascade received the proposed penalty assessment on August 21, 2001.

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 Cascade’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 Georges Colliers, Inc.*, 22 FMSHRC 939, 939-41 (Aug. 2000) (remanding to judge where operator misfiled proposed penalty assessment due to changes in office personnel); *E. Ark. Contractors, Inc.*, 21 FMSHRC 981, 981-83 (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.

---

Mary Lu Jordan, Commissioner

---

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen, dissenting:

I would grant Cascade's request for relief. First, I note that the Secretary does not oppose the operator's motion. I also note that the operator 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)). Nor do I find any other circumstances that would render a grant of relief here problematic. Under these circumstances, I thus fail to see the need or utility for remanding this matter.

---

Theodore F. Verheggen, Chairman

## Distribution

Joseph B. Clerget, President  
Cascase Sand & Gravel, Inc.  
6802 196<sup>th</sup> Avenue, S.W.  
Rochester, WA 98579

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd., Suite 400  
Arlington, VA 22203

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