FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

May 7, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEST 2002-276-M
	:	WEST 2002-277-M
CHOLLA READY MIX, INC.	:	

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 March 4, 2002, the Commission received from Cholla Ready Mix, Inc. ("Cholla") a request to reopen penalty assessments that had become final orders 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 submitted by Cholla's President, Dale McKinnon, the operator, which is unrepresented by counsel, asserts that it filed a hearing request to contest the proposed penalties in A.C. No. 02-01823-05517, which is the subject of Docket No. WEST 2002-165-M, and mistakenly believed that its request applied also to the proposed penalties in A.C. Nos. 02-01823-05516 and 02-01823-05518, which are the subjects of this request to reopen. Mot.

Cholla explains that it "thought [it] had already contested them when [it] contested 19 other violations." *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, however, we are unable to evaluate the merits of Cholla's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Cholla has met the criteria for relief under Rule 60(b). *See Eclipse C Corp.*, 23 FMSHRC 134, 135 (Feb. 2001) (remanding to a judge where operator failed to timely file hearing request because it mistakenly believed that its filing of a contest for one proposed assessment also applied to two other proposed assessments it received at the same time). 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 Cholla'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 for or utility of remanding this matter.

Theodore F. Verheggen, Chairman

Distribution

Dale McKinnon, President
Cholla Ready Mix, Inc.
P.O. Box 789
Holbrook, AZ 86025

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
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