FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

July 16, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. YORK 98-87-M
	:	A.C. No. 18-00525-05501 9BM
CUSIC TRUCKING, INC.	:	

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

ORDER

BY: Jordan, Chairman; Riley and Beatty, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994). On January 27, 1999, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Cusic Trucking, Inc. ("Cusic") for failing to answer the October 21, 1998 petition for assessment of penalty filed by the Secretary of Labor or the judge's December 9, 1998 Order to Respondent to Show Cause. The judge assessed the $90 civil penalty proposed by the Secretary.

On March 17, 1999, the Commission received a copy of a letter from Cusic dated September 9, 1998 disputing the Secretary's proposed civil penalty. Mot. at 1. While this letter appears to be a response to the Secretary's proposed penalty assessment, it was forwarded to the Commission without explanation or assertion that it had been previously sent to either the Commission or the Secretary of Labor. Moreover, the letter does not mention the default order issued in this matter.

On May 7, 1999, the Commission received the Secretary's opposition of Cusic's request. The Secretary asserts that the September 9 letter Cusic submitted to the Commission fails to state grounds upon which Fed. R. Civ. P. 60(b) relief could be granted. S. Opp'n at 5-6.

The judge's jurisdiction over this case terminated when his default order was issued on January 27, 1999. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of an order's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Cusic's request

was received by the Commission on March 17, after Judge Merlin's order had become a final decision of the Commission.

Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b); *see also* 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). Rule 60(b) motions are committed to the sound discretion of the judicial tribunal in which relief is sought. *Randall v. Merrill Lynch*, 820 F.2d 1317, 1320 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988); *see Green Coal Co.*, 18 FMSHRC 1594, 1595 (Sept. 1996).

The operator offers no explanation for its failure to timely file an answer to the Secretary's petition for assessment of penalty or to the judge's show cause order. Thus, Cusic has failed to set forth any grounds establishing that Fed. R. Civ. P. 60(b) relief is appropriate. *See Tanglewood Energy, Inc.*, 17 FMSHRC 1105, 1107 (July 1995) (denying request to reopen final Commission order where operator failed to set forth grounds justifying relief); *Green Coal Co.*, 18 FMSHRC at 1595 (denying unrepresented operator's late-filed petition for discretionary review of judge's decision because no satisfactory explanation offered for late filing).[1]

[1] Our holding here in no way departs from the Commission's longstanding practice of holding the pleadings of unrepresented litigants to less stringent standards than those drafted by attorneys. *See, e.g.*, *CG&G Trucking, Inc.*, 15 FMSHRC 193, 193-94 (Feb. 1993) (remanding where small operator acting without benefit of counsel offered potentially valid reason for failing to timely respond to show cause order); *Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990) (same). Rather, we maintain that, even applying this less stringent standard, Cusic has failed to present in its request a colorable claim on which we could grant relief from the final order. In this regard, the instant matter is distinguishable from *Farmer v. Island Creek Coal Co.*, 13 FMSHRC 1226, 1231-32 (Aug. 1991), cited by the dissent (slip op. at 4), in which we determined that, "[g]iven the possible exculpatory nature of [complainants'] explanations [for their failure to meet a filing deadline], a remand to the judge to allow him to assess the merits of these allegations is appropriate." 13 FMSHRC at 1232. Here, by contrast, Cusic has offered no explanation whatsoever for its failure to respond to the judge's show cause order, which unambiguously and in plain language ordered Cusic to "send an Answer . . . within 30 days or show good reason for [failing] to do so." Show Cause Order dated December 9, 1998.

Accordingly, Cusic's request for relief from the final Commission decision is denied.[2]

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

[2] The dissent views Cusic's September 9 letter, submitted with the notice of contest, as the "functional equivalent" of an answer to the petition for assessment of penalty filed October 21, 1998. Slip op. at 4 n.2. It appears that the dissent would consider such a submission (at least by an unrepresented operator) to absolve the operator from the requirement of Commission Procedural Rule 29, 29 C.F.R. § 2700.29, to file an answer to a penalty petition. This approach would also permit Cusic to, in effect, answer a petition for penalty assessment that has not yet been filed.

Commissioners Marks and Verheggen, dissenting:

We dissent. 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)). In keeping with this principle, we believe that cases involving pro se litigants should be dismissed on a pleading technicality only in the very rarest of cases. Instead, in such cases, judges should ensure that they inform themselves of all the available facts relevant to their decisions, including pro se litigants' versions of those facts. *Perry v. Phelps Dodge Morenci Inc.*, 18 FMSHRC 1918, 1920 (Nov. 1996) (citing *Heckler v. Campbell*, 461 U.S. 458, 470-73 (1983) (Brennan, J., concurring)).

Here, Cusic's case was dismissed because he failed to file an answer to the Secretary's petition for assessment of a penalty. Slip op. at 1; *see* 29 C.F.R. § 2700.29.[1] We note, however, that when he initially notified the Secretary of his intent to challenge her proposed penalty, his statement essentially met the requirements of Rule 29. On remand, we would direct the judge to treat it accordingly, and to allow Cusic the opportunity to pursue his case.[2]

We find the issues in this case not dissimilar from those in *Farmer v. Island Creek* (a case involving a pro se claimant), where the Commission stated: "Given complainant's silence below in the face of the operator's motion to dismiss, this case arrives at the Commission in virtually the same posture as a default. As in any default case, the defaulted party has failed to speak at some crucial juncture." 13 FMSHRC at 1232. After noting "a pro se party's general lack of understanding of appropriate Mine Act and Commission procedure," the Commission held: "We conclude that good cause [for the complainant's delay] has been shown to the extent that, in the interests of justice, the matter should be remanded to the judge so that complainants' explanations can be placed before him for his resolution." *Id*.

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[1] Commission Procedural Rule 29 provides: "A party against whom a petition for assessment of penalty is filed shall file an answer within 30 days after service of the petition for assessment of penalty. An answer shall include a short and plain statement responding to each allegation of the petition."

[2] Our colleagues state that "Cusic has failed to set forth any grounds establishing that Fed. R. Civ. P. 60(b) relief is appropriate." Slip op. at 2. Our focus, however, is different from that of our colleagues. Where they focus on whether Cusic's request for relief meets the requirements of Rule 60(b), we focus on the proceedings below and find that the judge, under the Commission's liberal approach to pro se pleadings, could have treated Cusic's initial filing with the Secretary as the functional equivalent of an answer and gone on with the proceedings. Our colleagues also fault us for taking an approach that would "absolve the operator [not represented by counsel] from the requirement of [Rule 29] to file an answer," and that would permit Cusic to "answer a [penalty] petition . . . that has not yet been filed." Slip op. at 3 n.2. Our point is, however, that Cusic filed a pleading that is, for all intents and purposes, an answer. Faulting him for filing such a paper before a petition was filed appears to us to exalt form over substance.

We believe that the Commission's reasoning in *Farmer* and *Perry* applies here, and we would therefore vacate the judge's dismissal order and remand the case for further evidentiary proceedings.

Marc Lincoln Marks, Commissioner

Theodore F. Verheggen, Commissioner

Distribution

Thomas B. Cusic, President
Cusic Trucking, Inc.
P.O. Box 62
Abell Road
Avenue, MD 20609

Jack Powasnik, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

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