FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

July 22, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2002-52-M
v.	:	A.C. No. 30-00964-05527
CRANESVILLE AGGREGATES COMPANY, 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 28, 2002, the Commission received from Cranesville Aggregates Company ("Cranesville") 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).

Cranesville's request was submitted by Joseph Sagarese, the company's safety director. Mot. He asserts that Cranesville failed to file a hearing request because, pursuant to conversations with officials from the Department of Labor's Mine Safety and Health Administration ("MSHA"), it was awaiting the results of an MSHA investigation. *Id.* Sagarese claims that he believed that Cranesville had been granted an extension of time in which to contest the related penalties. *Id.* He further states that the company wishes to contest two penalty issues relating to the penalty proceedings but he does not specify which of the 19 proposed penalties listed in the proposed penalty assessment the company wants to contest. *Id.* Cranesville is

apparently proceeding pro se. Attached to its request are copies of MSHA's delinquency letter and the proposed penalty assessment. *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 Cranesville's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Cranesville has met the criteria for relief under Rule 60(b). *See Powell Mt. Coal Co., Inc.*, 23 FMSHRC 144, 144-47 (Feb. 2001) (remanding to judge where operator alleged it failed to timely file green card based on erroneous information from MSHA officials); *Dean Heyward Addison*, 19 FMSHRC 681, 681-83 (Apr. 1997) (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

Joseph A. Sagarese, Safety Director
Cranesville Aggregates Co., Inc.
427 Sacandaga Road
Scotia, NY 12302

W. Christian Schumann, Esq.
Office of the Solicitor
U. S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-3939

Myra James
Civil Penalty Compliance, MSHA
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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