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. PENN 2002-22-M
v.	:	A.C. No. 36-00251-05541
	:	
SOUTHDOWN, 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 25, 2001, the Commission received from Southdown, Inc. ("Southdown") 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, Southdown, apparently proceeding pro se, asserts that it failed to timely submit a request for a hearing because the Department of Labor's Mine Safety and Health Administration ("MSHA") sent the proposed penalty assessment to the wrong person at Southdown. Mot. It contends that the person who received the proposed penalty assessment is often off site for weeks at a time and is not the person listed on the "MSHA Legal Identity Form." *Id.* Southdown maintains that, since September 1999, it has attempted to update the

"Name of the Person to Receive Official Mail or Service." *Id.* A copy of the proposed penalty assessment was attached to Southdown's request.

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 Southdown's position. In particular, the record is unclear as to the identity of the company official listed on the Notification of Legal Identity form filed with MSHA, and the reasons surrounding Southdown's alleged inability to change that identity. 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 generally Concrete Materials of Mont., LLC*, 23 FMSHRC 1209, 1209-11 (Nov. 2001) (vacating default and remanding to judge where operator did not answer Secretary's petition or judge's show cause order because MSHA and judge allegedly sent documents to wrong address); *San Juan Coal Co.*, 23 FMSHRC 800, 800-03 (Aug. 2001) (vacating default and remanding to judge where operator did not answer Secretary's petition or judge's show cause order because MSHA and judge allegedly failed to send documents to designated company official). 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, dissenting:

I would grant Southdown'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

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