FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., 6TH FLOOR
WASHINGTON D.C. 20006-3868
April 29, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 98-23-M
Petitioner	:	A. C. No. 24-00500-05512-A
	:	
v.	:	
BRIAN FORBES, EMPLOYED BY	:	Hamilton Rock Production Pit & Plant
HAMILTON ROCK PRODUCTS,	:	
Respondent	:	

ORDER DENYING MOTION TO REOPEN

This case is before me pursuant to an order of remand by the Commission dated February 6, 1998.

The petitioner, Brian D. Forbes, filed a motion with the Commission to reopen a penalty assessment of the Mine Safety and Health Administration (hereafter referred to as "MSHA") that had become final by operation of law. The Commission held that on the basis of the record before it, a determination could not be made on the merits of the motion. Accordingly, the case was remanded for a determination whether petitioner met the requirements for relief.

On September 22, 1993, a citation was issued to petitioner's employer, Maricorp, Inc., for a violation of 30 C.F.R. § 57.14130 (g). According to petitioner's affidavit, dated October 22, 1997, the citation was served on petitioner who was the operator's manager. He forwarded the citation to the person designated by the operator to represent it in such matters.

On March 28, 1994, MSHA sent petitioner a letter by certified mail advising him that he was subject to a proposed civil penalty assessment under section 110(c) of the Act, 30 U.S.C.A. § 820(c).[1] This letter was addressed to petitioner at Maricorp, but he had left the employ of that company. The letter was returned with the notation on the envelope that he was no longer there.

Attached to an affidavit executed on December 9, 1997, by Barbara Renowden, an MSHA supervisory investigator, is a memorandum dated May 16, 1994 from Ms. Renowden to the Administrator for Metal and Non Metal Safety and Health. The memorandum recites that after the March 28 letter was returned, petitioner was contacted on his mobile phone and told that MSHA was trying to reach him to advise that he could have a conference on the violation. According to the memorandum, petitioner was hostile and uncooperative. On April 1, 1998, Ms. Renowden executed a second affidavit stating that at the time she wrote the memo of

[1] Attachments A and B to affidavit dated 12/11/97 of C. Bryan Don, Chief of Penalty Compliance Office, Office of Assessments, MSHA.

May 16, 1994, she knew the facts therein to be true and accurate, but that she does not have a current recollection of who in her office spoke to petitioner. In an affidavit dated April 10, 1998, petitioner states that prior to receiving a notice dated August 8, 1997, he had absolutely no knowledge that a citation had been issued.

The postmaster of Marion, Montana, in an affidavit dated March 26, 1998, states that petitioner is a customer of the post office and since 1982 has continuously rented a post office box there. According to the postmaster, the Postal Service places Form 3849 in the postal box to notify the box customer of the delivery of certified mail. She further recites that up to three notices may be provided before the Postal Service returns the certified letter to the sender as "unclaimed" and the date of each notice is written on the envelope. Finally, the postmaster advises that the Form 3849 stays in the box until the customer picks it up and that even if the mail is returned to the sender, the form still stays in the box.

On April 26, 1994, MSHA sent petitioner a letter regarding a proposed 110(c) penalty assessment by certified mail addressed to his post office box in Marion, Montana.[2] According to the postmaster's affidavit, the first notice was placed in his box on April 28, 1994, the second notice was placed there on May 4, 1994, and the letter was returned to MSHA on May 12, 1994.

On July 12, 1994, MSHA sent petitioner the notice of civil penalty assessment by certified mail addressed to his post office box.[3] According to the postmaster's affidavit, the first notification was placed in his box on July 25, 1994, the second was placed there on August 5, 1994, and the letter was returned on August 10, 1994.

Thereafter, on June 20, 1995, MSHA sent petitioner a letter by regular mail addressed to his post office box advising him that legal action would commence against him, unless he made immediate arrangements to satisfy the unpaid civil penalty.[4] This letter was not returned to MSHA.

On September 27, 1995, MSHA sent petitioner a letter, by certified mail addressed to his post office box, seeking payment of the debt, giving the amount due including accrued interest, and stating the continued nonpayment of the debt would result in referral to the Internal Revenue Service.[5] According to the postmaster's affidavit, the first notice was placed in his box on October 5, 1995, the second was placed there on October 11, 1995, and the letter was returned on October 24, 1995.

Another certified mail letter dated October 25, 1996, was sent to petitioner at his post

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[2] Attachments C and D to Don affidavit.

[3] Attachments E and F to Don affidavit.

[4] Attachment G to Don affidavit.

[5] Attachments H and I to Don affidavit.

office box again seeking payment of the debt, giving the amount due including accrued interest, and stating that continued nonpayment would result in referral to the Internal Revenue Service.[6] According to the postmaster's affidavit, the first notice was placed in his box on November 4, 1996, the second notice was placed there on November 8, 1996, and the letter was returned on November 19, 1996.

On August 8, 1997, the Department of the Treasury sent petitioner a letter by regular mail advising him that MSHA had referred the debt for collection and that aggressive legal action would be commenced against him unless he made payment.[7] On September 4, 1997, petitioner telephoned the Civil Penalty Compliance Division, Office of Assessments, in MSHA and requested information regarding the civil penalty assessment and delinquent debt. On the next day relevant documents were sent to him.[8] Petitioner's attorney then wrote MSHA and the Department of the Treasury on September 10, 1997, seeking to contest the proposed penalty assessment.[9] However, he was informed by MSHA on September 25, 1997, that the proposed assessment was final and petitioner could file a motion for relief with this Commission.[10]

Pursuant to my order dated February 24, 1998, petitioner's wife executed an affidavit dated April 10, 1998, wherein she avers as follows: she and Mr. Forbes have been married since 1974; they have maintained a permanent residence in Marion, Montana since the 1970s; when her husband is out of town it is her practice to pick up their mail at the post office; if Mr. Forbes receives letters addressed just to him, it is her practice to forward such mail to him at his current work site; she never opens mail addressed in his name only; she has never signed for any certified or registered mail because she is never certain how long it might take before such mail is delivered to him at his work site; if certified letters were returned to MSHA by the Post Office marked unclaimed, it is because they were in her husband's name only; she has never signed for or picked up any certified or registered letters addressed to her husband; she has no recollection of ever receiving or picking up any notice from the Department of Labor except for the letter dated August 8, 1997, which she forwarded to him at his work site.

As already noted, petitioner also executed an affidavit on April 10, 1998, wherein he alleges that before the August 8, 1997, he had no notice that a citation had been issued and that he has never wilfully or intentionally tried to avoid service.

In the brief filed on petitioner's behalf, his counsel represents the following: petitioner's wife and son occupied their home during the son's attendance at Flathead High School; petitioner owned property, land and structures in Flathead County, Montana; petitioner has vehicles registered in Montana, and petitioner has paid the Montana personal property tax. In addition, attached to the brief is documentation showing that petitioner worked outside Montana for these periods: May 21, 1994, to June 4, 1994; June 13, 1994, to November 6, 1994;

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[6] Attachments J and K to Don affidavit.

[7] Attachment L to Don affidavit.

[8] Attachment M to Don affidavit.

[9] Attachment N to Don affidavit.

[10] Attachment O to Don affidavit.

August 18, 1995, to March 22, 1996; April 8, 1996, to December 4, 1997; and March 2, 1998 to the present. These dates do not cover the period from April 26, 1994, to May 12, 1994, when delivery of the first notice addressed to his post office box, was attempted. Also, the record, as presently constituted, does not indicate whether petitioner returned home during these periods of employment.

Applicable Law

Section 110(c) of the Act, supra, provides as follows:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

It is under section 110(c) that MSHA proposed a penalty assessment against petitioner.

Section 105(a) of the Act, 30 U.S.C.A. § 815(a), provides in pertinent part as follows:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. * * * If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, * * * the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a citation and proposed assessment of penalty under this subsection shall constitute receipt thereof within the meaning of this subsection.

See also 30 C.F.R. § 100.7; 29 C.F.R. § § 2700. 25, 2700.26 & 2700.27.

It is pursuant to section 105(a) and the cited regulations that MSHA argues the proposed penalty assessment against petitioner has become final and is not subject to review.

Rule 60(b) of the Federal Rules of Civil Procedure provides as follows:

> On motion and upon such terms as are just, the court may relieve a party * * * from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud * * *, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied,

> released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

It is under rule 60(b) that the Commission has held that it has jurisdiction in appropriate cases to reopen penalty assessments that have become final pursuant to section 105(a), supra. Brian Forbes, Employed by Hamilton Rock Products, 20 FMSHRC 99, 100 (February 1998); Rocky Hollow Coal Co., 16 FMSHRC 1931, 1932 (September 1994); Jim Walter Resources, Inc., 15 FMSHRC 782, 786-89 (May 1993).

Discussion and Analysis

For purposes of deciding petitioner's motion on the present record, the representations and allegations made by him and his wife will be accepted as true.[11] The gravamen of petitioner's case is that he did not receive actual notice of the penalty assessment made against him.

Petitioner's motion to reopen was not filed within one year of the date the proposed penalty assessment became final pursuant to section 105(a), supra. Accordingly, the motion cannot be considered under subparagraph (1) of Rule 60(b), supra, which provides for relief in circumstances of excusable neglect when the request is made within one year. Pioneer Investment Services Co. v. Brunswick Associates LTD. Partnership, 507 U.S. 380, 393 (1993). Subparagraphs (2) through (5) do not apply. Therefore, the motion can only be considered under subparagraph(6), supra, which states that a judgment may be reopened at any time for any other reason justifying relief. The Supreme Court has held that subparagraphs (1) and (6) are mutually exclusive and that a party who fails to take timely action due to "excusable neglect" may not seek relief after more than a year later by resorting to subparagraph(6). Pioneer, at 393. To justify

[11]This does not mean, of course, that the petitioner's statements and those of his wife would not present serious questions of credibility, were they not being accepted as true for purposes of the motion. For instance, petitioner's wife avers that she forwarded regular mail to petitioner, but that she did not sign for certified mail addressed to him because she was not certain how long it would take before such mail was delivered to him at his work site. Any worry about delivery time would apply to regular mail as well as certified mail and she admittedly forwarded regular mail to him. Also, concern about delivery time would not be lessened by refusing the mail. On the contrary, refusal insured that the mail would not be received. And no reason is given why petitioner's wife did not open any mail addressed to him, regardless of where the mail came from and despite the fact they have been married over 20 years. In assessing the validity of the allegation that she did not remember receiving or picking up any notice from MSHA, account would have to be taken of the postmaster's statement that notices of certified mail are left in the post office box even when a letter is returned. Eight such notices were left in petitioner's box, but his wife states she does not remember any of them. In short, the statements made on the petitioner's behalf would raise serious questions of credibility if a determination of their truthfulness were necessary to a resolution of this matter. In addition, as already noted, petitioner has not accounted for his whereabouts when attempts were made to deliver the first notice addressed to him at his post office box.

relief under subparagraph (6) a party must show "extraordinary circumstances", suggesting that the party is faultless in the delay. Ibid., See also Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863-864 (1988); Ackermann v. United States, 340 U.S. 193, 197-200 (1950); Klapprott v. United States, 335 U.S. 601, 613-614 (1949).

Bearing these principles in mind, we turn to petitioner's request. In Mullane v. Central Hanover B. & T. Co., 339 U.S. 306 (1950), the Supreme Court set forth the standards under which adequacy of notice is judged, stating in pertinent part as follows:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections * * * But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.

Id. at 314-315.

The Court further stated that the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish notice and that the reasonableness and hence constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably likely to inform those affected. Id. at 315.

Mullane has been the touchstone for the development of a substantial body of law which holds that the appropriate inquiry is whether or not the method used to effectuate service is reasonably calculated under all the circumstances to apprise the interested party of the pendency of the action. Certified mail has been held to satisfy the due process due a litigant or prospective litigant. Fuentes-Argueta v. I.N.S., 101 F.3d 867, 872 (2nd Cir. 1996); U.S. v. Clark 84 F.3d 378, 381 (10th Cir. 1996); Sarit v. U.S. Drug Enforcement Admin., 987 F.2d 10, 14-15 (1st Cir. 1993). Moreover, the courts have repeatedly approved the use of regular first-class mail as a constitutionally adequate means of service. In Re Blinder, Robinson & Co., Inc., 124 F.3d 1238, 1243 (10th Cir. 1997); Weigner v. City of New York, 852 F.2d 646, 650 (2nd 1988). Even more importantly, the courts recognize that due process does not require that the interested party actually receive notice. In Re Blinder, Robinson & Co., Inc., supra at 1243; Fuentes-Argueta v. I.N.S., supra at 872; U.S. v. Clark, supra at 381; Katzson Bros., Inc. v. U.S.E.P.A., 839 F.2d 1396, 1400 (10th Cir. 1988); Weigner v. City of New York, supra at 650; Stateside Machinery Co., Ltd v. Alperin, 591 F.2d 234, 241 (1979). An individual who moves and does not provide his new address, cannot challenge service by certified or regular mail on the basis there was no actual notice. Fuentes-Argueta v. I.N.S., supra at 872; U.S. v. Perez-Valdera, 899 F. Supp. 181, 184 (S.D.N.Y. 1995); U.S. v. Estrada-Trochez, 66 F.3d 733, 735 (5th Cir. 1995). An exception to the foregoing principles is made only when the notifying party sends the notice to an address it has reason to know will not accomplish notice. Small v. U.S., 136 F.3d 1334, 1336-1337 (D.C. Cir. 1998); U.S. v. Rodgers, 108 F.3d 1247, 1253 (10th Cir. 1997); Torres v. $36,256.80 U.S. Currency,25 F.3d 1154, 1161 (2nd Cir. 1994); Aero-Medical, Inc. v. U.S., 23 F.3d 328, 330-331 (10th Cir. 1994).

It is clear that under these principles, petitioner's claim fails. Over a 2½ year period MSHA sent four notices by certified mail to petitioner at the post office box which he had maintained for many years and which was located in the town of his permanent residence. These mailings satisfy due process under the Mullane decision, because they were reasonably calculated

under all the circumstances to tell the petitioner of the penalty assessment against him. Indeed, it can fairly be said that the repeated certified mailings addressed to the petitioner at the post office box he continually maintained in the town where his permanent home was located, constituted the means best calculated to reach him. The claim for relief is based upon the absence of actual notice. However, the case law set forth supra, demonstrates that actual notice is not necessary where, as here, the method of notification was reasonably calculated to advise the individual. Finally, petitioner has only himself to blame for his lack of actual notice. Even accepting the questionable statements and arguments made on his behalf, it is clear that the petitioner is at fault for failing to furnish a forwarding address or otherwise provide for his receipt of all mail sent to him. Indeed, any rational evaluation of the practices and procedures adopted by petitioner and his wife leads to the inescapable conclusion that their modus operandi would defeat virtually any attempt to achieve actual notice by certified mail.

In addition, petitioner is not entitled to relief under Rule 60(b)(6). As set forth supra, relief is available under extraordinary circumstances suggesting that the movant is without fault. Pioneer, at 393. There are no such extraordinary circumstances here. On the contrary, petitioner's own arrangements for his mail are responsible for the defeat of all attempts to notify him by certified mail.

I recognize that the Commission has held that default is a harsh remedy. Kentucky Stone, 19 FMSHRC 1621, 1622 (October 1997); Peabody Coal Company, 19 FMSHRC 1613, 1614 (October 1997); Jim Walter Resources, 19 FMSHRC 991, 992 (June 1997); See Coal Preparation Services, Inc., 17 FMSHRC 1529, 1530 (September 1995). Following the Commission's teachings, I have reopened many cases. M & Y Services, Inc., Docket No. PENN 97-93-M, Unpublished Order dated April 8, 1997; Eastern Associated Coal Corp., Docket No. WEVA 97-81, Unpublished Order dated March 24, 1997; Del Rio, Inc., Docket No. KENT 97-138, Unpublished Order dated March 12, 1997; R B Coal Company, 17 FMSHRC 2153 (November 1995). But the Commission has never decided that defaults are never to be imposed and has itself denied reopening in appropriate cases. Lakeview Rock Products, Inc., 19 FMSHRC 26 (January 1997); Thomas Hale, Employed by Damon Corp., 17 FMSHRC 1815 (November 1995); Jim Walter Resources, Inc., 15 FMSHRC at 789-791. Relief is to be accorded in those instances where it is available under substantive legal principles and the Federal Rules. Where such relief is not warranted, the Secretary's right to finality must prevail. If ever a case justified a finding of finality, the instant one does. As already set forth, MSHA attempted many times to notify petitioner and petitioner himself was to blame for the fact that these attempts were unsuccessful.

In light of the foregoing, it is **ORDERED** that the motion to reopen is **DENIED**.

Paul Merlin
Chief Administrative Law Judge

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