FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

June 1, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 99-144-M
	:	A. C. No. 05-03802-05529A
JOHN MARTIN, employed by ROARING FORK AGGREGATES, INC.	:	

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

ORDER

BY: Marks, Verheggen, 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 1, 1999, the Commission received from John Martin, an employee of Roaring Fork Aggregates, Inc. ("Roaring Fork"), a request to reopen a penalty assessment for a violation of section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose Martin's motion requesting relief under Fed. R. Civ. P. 60(b).

Under section 105(a) of the Mine Act, an individual charged with a violation under section 110(c) has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that he or she wishes to contest the proposed penalty. 30 U.S.C. § 815(a); *see also* 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a); 29 C.F.R. § 2700.27.

Martin submits that his failure to timely contest the section 110(c) penalties proposed

against him was due to his counsel's reliance on an erroneous statement made by a representative of the Department of Labor's Mine Safety and Health Administration ("MSHA"). Mot. at 2. The proposed penalties against Martin stem from a July 19, 1997 fatal accident, which also resulted in the issuance of three August 7, 1997 section 104(d)(1) orders against Roaring Fork. *Id.* at 1. The section 104(d)(1) orders are the subject of proceedings before Administrative Law Judge Richard Manning. *Id.* These proceedings were stayed to allow a section 110(c) investigation of Martin and Shane Porter, another employee of Roaring Fork, to proceed. *Id.* at 1-2. Counsel for Martin states that, on January 15, 1999, agents for the operator provided counsel with the notice of proposed assessment served upon Martin, but that the operator's agents did not inform counsel of the date the proposed penalty assessment had been received by Martin. *Id.* at 2. Counsel alleges that, during a January 28 telephone conversation, MSHA's Civil Penalty Compliance Office informed him that Martin received the proposed penalty assessment on January 13. *Id.* On February 25, counsel received written notice from MSHA's Civil Penalty Compliance Office that the proposed penalty assessment for Martin had been received on January 8, that the hearing request filed by Martin on February 10 was therefore untimely, and that the proposed penalty had become a final order of the Commission. *Id.*

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We also have 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 Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). 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 National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

The record indicates that Martin intended to contest the proposed penalty issued against him, and that, but for his counsel's reliance upon an MSHA representatives' erroneous statement, he likely would have contested the proposed penalty. In the circumstances presented here, Martin's late filing of a hearing request may be considered inadvertence or excusable neglect within the meaning of Rule 60(b)(1). *See National Lime & Stone*, 20 FMSHRC at 924-25 (reopening matter when operator's late filing of hearing request was due to mutual misunderstanding between counsel for operator and counsel for MSHA as to need to challenge penalty assessment prior to judge's approval of parties' settlement); *Stillwater*, 19 FMSHRC at 1022-23 (granting operator's motion to reopen when operator failed to submit request for hearing to contest proposed penalty due to lack of coordination between recipient of assessment at mining facility and its attorneys, after indicating intent to contest related citation).

Accordingly, in the interest of justice, we reopen this penalty assessment that became a final order with respect to the section 110(c) penalties proposed against Martin in this case. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Marc Lincoln Marks, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Riley, dissenting:

We would remand this case for the purpose of assessing the reliability of evidence presented by Martin as to why he did not request a hearing in a timely manner. Although we are mindful that the Secretary does not object to this motion, we would nonetheless remand to a judge for the initial evaluation of the evidence, which clearly is not within the province of a reviewing body. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 332 n.14 (Apr. 1998).

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Mary Lu Jordan, Chairman

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James C. Riley, Commissioner

Distribution

Timothy A. Thulson, Esq.
Balcomb & Green, P.C.
P.O. Drawer 790
Glenwood Spring, CO 81602

Edward Falkowski, Esq.
Office of the Solicitor
U.S. Department of Labor
1999 Broadway, Suite 1600
Denver, CO 80202-5716

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