



assessment. The Secretary stated that Mass Transport should check the mailing address it provided to MSHA to be sure that it is up-to-date.

On June 18, 2008, the Commission issued an order denying the operator's motion. The Commission explained that the operator's counsel set forth conflicting and confused information regarding the identity of the movant in both the caption and body of the motion, and that the operator's counsel failed to establish that the movant, as identified in the motion to reopen, had standing to make the request.

On July 2, 2008, the Commission received from Mass Transport a second request to reopen. Counsel, who states that she represents both Mass Transport and Delbarton, acknowledges that she misidentified the movant as Delbarton instead of Mass Transport in the style of the motion to reopen.<sup>1</sup> Counsel explains that she mistakenly believed that the citation, orders and Proposed Assessment had been issued to Delbarton because the mine I.D on the citation and orders and the Proposed Assessment identifies Delbarton as the mine.

In its second request, Mass Transport reiterates that it failed to timely contest the proposed assessment because the proposed assessment had been mailed to an incorrect address. In response to the Secretary's prior submission that MSHA had mailed the proposed assessment and delinquency notice to Mass Transport's address of record at the time of the assessment, Mass Transport states that the proposed assessment had been mailed to an address that was not the mailing address or physical address of either Delbarton or Mass Transport. Mass Transport asserts that, in fact, MSHA has Mass Transport's correct address because MSHA previously has mailed correspondence to Mass Transport at the correct address and lists the correct address in MSHA's data retrieval system on its website.<sup>2</sup>

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence or excusable neglect. *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. We have also observed

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<sup>1</sup> Although counsel acknowledges that she misidentified the movant in the style of the motion to reopen, as the Commission previously indicated, such misidentification existed throughout the body of the motion as well.

<sup>2</sup> In the second request to reopen, counsel for Mass Transport identifies the address that MSHA had correctly mailed correspondence to as P.O. Box 1117, Holden, WV 25625. Mot. at 2-3. Later in the same motion, counsel inexplicably identifies the correct mailing address as a different post-office box, that is, P.O. Box 1098. *Id.* at 3.

that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a 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).

It is an operator's responsibility to file with MSHA the address of a mine and any changes of address. 30 C.F.R. §§ 41.10, 41.12. Operators may request service by delivery to another appropriate address provided by the operator. 30 C.F.R. § 41.30.

It is unclear from the record whether MSHA mailed the proposed assessment to Mass Transport's official address of record at the time of assessment and whether Mass Transport maintained its correct address with MSHA. If MSHA sent the proposed assessment to Mass Transport's official address of record, grounds may exist for denying Mass Transport's request for relief. *Cf. Harvey Trucking*, 21 FMSHRC 567, 568-69 & n.1 (June 1999) (stating that operator is required to notify MSHA of changes of address). If, however, MSHA mailed the proposed assessment to an incorrect address, the proposed assessment may not have become a final Commission order and Mass Transport's request may be moot.

Having reviewed Mass Transport's motion, we remand this matter to the Chief Administrative Law Judge for a determination of whether Mass Transport timely contested the penalty proposal. We ask the Chief Judge, in considering the matter, to resolve the dispute over whether MSHA sent the proposed assessment to Mass Transport's official address of record at the time of assessment. The Judge shall order further appropriate proceedings based upon that determination in accordance with principles described herein, the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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