FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

June 11, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 99-87
	:	A.C. No. 46-08589-03502
HARVEY TRUCKING	:	

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

ORDER

BY: Jordan, Chairman; Riley 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 25, 1997, the Commission received from Harvey Trucking 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). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Harvey Trucking.

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).

Harvey Trucking asserts that it first learned of the order against it when it "received a final order for $2,000.00" Mot. Upon subsequent investigation, the operator was informed that two notices had been sent to the operator's address, but had been returned to sender after 10 days. *Id.* It is unclear from the record why service upon Harvey Trucking was unsuccessful, and why the operator did not receive the proposed penalty assessment. Harvey Trucking requests the

Commission to reopen this matter.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g.*, *Gary Klinefelter*, 19 FMSHRC 827, 828 (May 1997) (remanding for determination of whether relief from final order warranted where unclear why subject of section 110(c) investigation did not receive proposed penalty); *Waste Coal Management, Inc.*, 14 FMSHRC 423, 423-24 (Mar. 1992) (remanding where default order sent by certified mail may not have been received by operator). 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 Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously 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); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

On the basis of the present record, we are unable to evaluate the merits of Harvey Trucking's position.[1] In the interest of justice, we remand the matter for assignment to a judge to determine whether Harvey Trucking has met the criteria for relief under Rule 60(b). 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.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

[1] Unlike our dissenting colleagues (slip op. at 4), we find this case to be distinguishable from *Roger Richardson*, 20 FMSHRC 1259, 1260 (Nov. 1998). In *Richardson*, the Commission concluded that an individual did not "receive" the Secretary's penalty proposal within the meaning of section 105(a) of the Act under circumstances in which the penalty proposal was sent to Richardson's former address and Richardson was not required to inform the Department of Labor, Mine Safety and Health Administration ("MSHA"), of his change of address under 30 C.F.R. § 41.12. *Id.* at 1260. In contrast, Harvey Trucking is required to inform MSHA of any change of address under section 41.12. The Commission has previously denied an operator's request to reopen a final order where the operator failed in that responsibility. *Pit*, 16 FMSHRC 2033, 2034 (Oct. 1994). Here, we are unable to evaluate from the record whether Harvey Trucking maintained its correct address with MSHA or whether MSHA mailed the Secretary's penalty proposal to the address submitted by Harvey Trucking pursuant to section 41.12.

Commissioners Marks and Verheggen, dissenting:

Harvey Trucking has alleged that it never received any penalty proposals. An MSHA representative also apparently stated that two proposals were mailed to Harvey Trucking, but were both returned to MSHA. The Secretary has not disputed any of the facts set forth in Harvey Trucking's motion, and, in fact, does not oppose the motion.

We conclude that Harvey Trucking did not "receive" the Secretary's penalty proposal within the meaning of section 105(a) of the Mine Act and the Commission's Procedural Rules before he received the final order. *Roger Richardson*, 20 FMSHRC 1259, 1260 (Nov. 1998). Under these circumstances, remanding this matter to the judge for considering whether Harvey Trucking has met the criteria for relief under Rule 60(b) is not necessary. We would reopen the matter, and remand it for assignment to a judge so that the case could 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

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