

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

MAR 06 2017

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

JESSE CREEK MINING, LLC

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: Docket No. SE 2016-43
: A.C. No. 01-03422-389387
:
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BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY: Althen, Acting Chairman; Jordan, and Young, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On November 12, 2015, the Commission received from Jesse Creek Mining, LLC (“Jesse Creek”) a motion seeking 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 who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. 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).

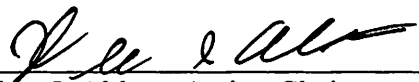
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final orders, the Commission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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on or around August 18, 2015, and became a final order of the Commission on or around September 18, 2015. Jesse Creek

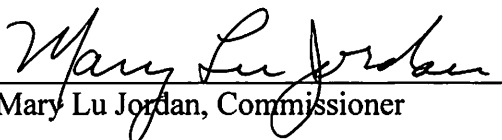
asserts that, as a result of its Safety Director's reassignment, the proposed assessment was delivered to the wrong employee, a partial payment was made in error, and a notice of contest was not timely filed. Jesse Creek further states that its legal representative investigated the matter in conjunction with the Office of Assessments and determined that the proposed assessment was received but did not locate a record of receipt. Jesse Creek claims that this investigation delayed the filing of the motion to reopen.

The Secretary does not oppose the request to reopen, but notes that MSHA received a partial payment on August 28, 2015. The Secretary further states that the proposed penalty should have received attention when it arrived at the mine. Records submitted by the Secretary show that the delivery date of the proposed assessment could not be confirmed.

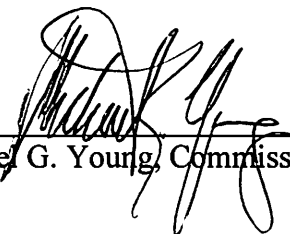
Having reviewed Jesse Creek's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



William I. Althen, Acting Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

Commissioner Cohen, dissenting:

I dissent from my colleagues' decision because I believe that Jesse Creek Mining, LLC ("Jesse Creek"), has not established good cause to reopen this civil penalty proceeding.

In attempting to excuse its failure to timely contest the Secretary's proposed civil penalty assessment, Jesse Creek asserts that its safety director was reassigned to a new position, resulting in "an inadvertent error" in the receipt of the assessment. Mot. to Reopen, at 1. Jesse Creek further avers that the assessment "was apparently delivered to the Mine, but obviously delivered to the improper responsible employee." Mot. to Reopen, at 2. Next, Jesse Creek states that it further inadvertently erred in sending MSHA a check for \$392.00 for payment of one of the citations in the penalty assessment. *Id.*

Jesse Creek's representations do not add up. The operator insists that the penalty assessment never reached an employee with the authority to handle such assessments. Nevertheless, the employee who received MSHA's proposed assessment possessed sufficient authority to decide not to contest one of the seven citations and to authorize a check paying that citation's penalty. This check was dated August 28, 2015, which was within 30 days of Jesse Creek's receipt of the proposed assessment. Thus, someone at the mine was taking responsibility for the handling of MSHA's proposed assessments, and did so, at least partially, in a timely fashion

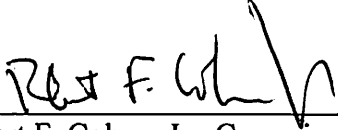
Unfortunately, we are left to guess who that employee was, as Jesse Creek's motion lacks any sworn affidavit to support its claims. Instead, we are left with the bare assertions of Jesse Creek's lawyer, in conflict with the Commission's stated guidance for petitioners seeking to reopen proposed penalties that have become final orders. The Commission's Guidance for Asking the Commission to Reopen Final Orders so that a Proposed Penalty may be Contested states, "Your motion should also be supported by affidavit(s) of (a) person(s) with direct knowledge of the underlying facts." Fed. Mine Safety and Health Review Comm'n, Requests to Reopen, <http://www.fmshrc.gov/content/requests-reopen>.

I note that this is not the only incident of Jesse Creek's failure to properly respond to proposed MSHA penalties. In September 2015, the operator defaulted in a Commission proceeding by neglecting to file a response to the Secretary's civil penalty petition and the subsequent Order to Show Cause issued by Chief Administrative Law Judge Robert J. Lesnick. *See Jesse Creek Mining, LLC*, 38 FMSHRC 2538 (Oct. 2016). The penalties proposed in both proceedings are significant, with the present proposed penalties tallying over \$113,000. Thus, Jesse Creek for months operated with a system for handling MSHA citations that was insufficient to flag even major proposed penalties.

I dissented in Jesse Creek's previous petition to the Commission, *see* 38 FMSHRC at 2540, and must dissent again here. The Commission has made clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland*

Mining Co., 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008). “Relief under Rule 60(b) should generally not be accorded to an operator who creates and condones a system which predictably will result in missed deadlines.” *Pinnacle Mining Co.*, 30 FMSHRC at 1062; *Pinnacle Mining Co.*, 30 FMSHRC at 1067.

Jesse Creek’s submissions in this matter do not suffice to show that the operator’s failures were a matter of mere “inadvertence.” Rather, the operator created an unreliable internal processing system and failed to take responsibility for its proposed citations over a substantial period of time. Accordingly, I would deny Jesse Creek’s motion to reopen.



Robert F. Cohen, Jr., Commissioner

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