

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

MAY 05 2017

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

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Docket No. SE 2016-187, et al.¹

v.

PROSPERITY COAL, LLC

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On April 5, 2016, the Commission received from Prosperity Coal, LLC (“Prosperity”) a motion seeking to reopen 19 penalty assessments that apparently have become final orders 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

¹ For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers SE 2016-187, SE 2016-165, SE 2016-166, SE 2016-167, SE 2016-168, SE 2016-169, SE 2016-170, SE 2016-171, SE 2016-172, SE 2016-173, SE 2016-174, SE 2016-175, SE 2016-176, SE 2016-177, SE 2016-178, SE 2016-179, SE 2016-180, SE 2016-181, and SE 2016-182 involving similar procedural issues. 29 C.F.R. § 2700.12. For the sake of brevity, the relevant docket numbers and associated A.C. numbers have been listed in Exhibit 1, attached to this order.

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 assessments were mailed to Prosperity between April 2, 2014 and December 30, 2015, but that all of the assessments were returned by the Post Office for various reasons (i.e., unclaimed, unable to forward, moved/left no address, etc.). In 18 of the 19 cases, delinquency notices were mailed to the operator and were also returned undelivered.

The record shows that the proposed assessments and delinquency notices were not all mailed to the same address. MSHA records indicate that mailings had gone to Prosperity’s address of record only in Docket Nos. SE 2016-187, SE 2016-165, SE 2016-166, SE 2016-168 (delinquency letter only), SE 2016-180 and SE 2016-181. All of the other mailings were sent to either one of two mailing addresses in Tennessee. The Tennessee addresses used by MSHA were not provided by Prosperity, but rather, were unearthed during an internet search by the Wilkes-Barre Office of Assessments.

Prosperity asserts that it never received the proposed assessments and that, due to “hard economic times,” the cases should be reopened so that it will be able to contest the large number of penalties at issue. Prosperity further alleges that the Secretary did not attempt to contact anyone at the company to inform it about the returned assessments.

The Secretary opposes the request to reopen and notes that the penalties were ultimately referred to the U.S. Department of Treasury for collection in 18 of the 19 cases. The Secretary argues that Prosperity cannot avoid its obligation to pay penalties under the Mine Act by failing to change its address of record or by not leaving a forwarding address with the post office. Furthermore, the Secretary notes that a majority of the cases at issue have been final orders for more than a year prior to the motion to reopen and that Prosperity has provided no justification for the lengthy delay.

MSHA must attempt to mail proposed penalties to the operator’s correct address in order to constitute valid service. *See, e.g., Brahma Group, Inc.*, 31 FMSHRC 527 (May 2009). If the proposed penalty is sent to an incorrect address, the operator has not been notified pursuant to 30 U.S.C. § 815(a) and the 30-day contest deadline was not triggered. *Id.*

In Docket Nos. SE 2016-167, SE 2016-169, SE 2016 170, SE 2016-171, SE 2016-172, SE 2016-173, SE 2016-174, SE 2016-175, SE 2016-176, SE 2016-177, SE 2016-178, SE 2016-179, and SE 2016-182, the Secretary did not mail the proposed penalty or the delinquency letter to the operator’s address of record. Pursuant to the Secretary’s own internal procedures, MSHA’s Office of Assessments should only try mailing to an alternative address after service was attempted to the address supplied by the operator, which in most cases is the address of record. *See* 30 C.F.R. § 100.8; MSHA, PROGRAM POLICY MANUAL, Vol. III, at 109 (June

2012). As Prosperity was not notified of the aforementioned proposed assessments, the penalties never became final orders of the Commission and the motion to reopen, as it pertains to these 13 cases, is moot.

In Docket Nos. SE 2016-187, SE 2016-165, SE 2016-166, SE 2016-168, SE 2016-180 and SE 2016-181, however, the record demonstrates that the Secretary did attempt service at Prosperity's address of record. During the relevant period, Prosperity filed six Legal ID Reports with MSHA. Between January 2014 and July 2015, Prosperity filed four reports listing its mailing address as 1340 South Laurel Road, London, Kentucky. In November 2015 and again in January of 2016, Prosperity listed its mailing address as 179 Pepperhill Drive, Suite 1, London, Kentucky.² The Secretary has represented that all mail sent to these addresses was returned undeliverable.

While the Commission has reopened cases where an operator has mistakenly failed to properly update its address of record, *see, e.g., Hoover Excavating, Inc.*, 35 FMSHRC 317 (Feb. 2013), the extent and effect of Prosperity's failure to provide MSHA with a mailing address is unprecedented. For nearly two years, Prosperity was issued citations during multiple MSHA inspections, but the company never received a single proposed assessment.³ The record contains no evidence that Prosperity took any proactive steps to inquire as to the status of the proposed assessments by contacting MSHA or simply checking the status of the penalties on MSHA's online database. Furthermore, Prosperity has not offered any explanation as to why mail sent to its address of record was returned undelivered. *See H & B Crushing, LLC*, 33 FMSHRC 2176 (Sept. 2011) (parties seeking reopening are encouraged to provide further pertinent information in response to the Secretary providing proof that the proposed assessments were mailed to the operator's address of record).

Moreover, Prosperity fails to explain when and how it learned of the delinquency as to the assessments at issue. In considering whether an operator has unreasonably delayed filing a motion to reopen penalty assessments, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice or other notification from MSHA and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009). As set forth in *Highland Mining Co.*, 31 FMSHRC 1313, 1317 (Nov. 2009), motions to reopen filed more than 30 days after receipt of delinquency information from MSHA should include an explanation for the delay in seeking reopening. The lack of such an explanation is grounds for the Commission to deny the motion.


² Operators have a duty to notify MSHA within 30 days of a change in its address of record. 30 C.F.R. § 41.12.

³ Prosperity timely contested at least one proposed assessment sent by MSHA prior to filing its motion to reopen. MSHA's records indicate that Assessment No. 000404392 was sent to Prosperity's Pepperhill Drive address and that the company's president, Timothy Webb, signed for the package on March 7, 2016. Prosperity has provided no explanation for why it received the proposed assessment in that instance but did not receive other mailings sent to its address of record.

In addition to the aforementioned rationale, reopening is presumptively barred for two of the proposed assessments by the express terms of Rule 60(b). We have consistently held that a Rule 60(b) motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect under subsections (1), (2), and (3) of the rule, not more than one year after the judgment, order, or proceeding was entered or taken. In the case of Assessment Nos. 000357605 and 000355292 (Docket Nos. SE 2016-180 and SE 2016-181), Prosperity did not meet this one year time frame. *See JS Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

Having reviewed Prosperity's request and the Secretary's response, we conclude that proper service was never effected for the proposed assessments that were not mailed to the operator's address of record and thus Prosperity's motion to reopen those assessments is moot. Accordingly, Docket Nos. SE 2016-167, SE 2016-169, SE 2016 170, SE 2016-171, SE 2016-172, SE 2016-173, SE 2016-174, SE 2016-175, SE 2016-176, SE 2016-177, SE 2016-178, SE 2016-179, and SE 2016-182 are remanded 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.


However, we find that Prosperity has failed to establish good cause for reopening the proposed penalty assessments that the Secretary mailed to its address of record. Therefore, we deny its motion to reopen Docket Nos. SE 2016-187, SE 2016-165, SE 2016-166, SE 2016-168, SE 2016-180 and SE 2016-181.



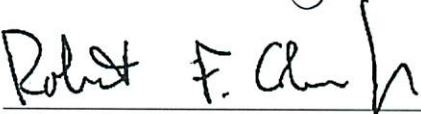
William I. Althen, Acting Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

Exhibit 1

Operator	Docket Number	A.C. Number
Prosperity Coal, LLC	SE 2016-187	40-03177-400154
Prosperity Coal, LLC	SE 2016-165	40-03177-395720
Prosperity Coal, LLC	SE 2016-166	40-03177-393267
Prosperity Coal, LLC	SE 2016-167	40-03177-390499
Prosperity Coal, LLC	SE 2016-168	40-03177-385664
Prosperity Coal, LLC	SE 2016-169	40-03177-382736
Prosperity Coal, LLC	SE 2016-170	40-03177-380157
Prosperity Coal, LLC	SE 2016-171	40-03177-377830
Prosperity Coal, LLC	SE 2016-172	40-03177-375583
Prosperity Coal, LLC	SE 2016-173	40-03177-374168
Prosperity Coal, LLC	SE 2016-174	40-03177-373191
Prosperity Coal, LLC	SE 2016-175	40-03177-370978
Prosperity Coal, LLC	SE 2016-176	40-03177-368180
Prosperity Coal, LLC	SE 2016-177	40-03177-365843
Prosperity Coal, LLC	SE 2016-178	40-03177-363251
Prosperity Coal, LLC	SE 2016-179	40-03177-360240
Prosperity Coal, LLC	SE 2016-180	40-03177-357605
Prosperity Coal, LLC	SE 2016-181	40-03177-355292
Prosperity Coal, LLC	SE 2016-182	40-03177-346722

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