

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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WASHINGTON, DC 20004-1710

August 30, 2018

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
	:	Docket No. PENN 2017-153
v.	:	A.C. No. 36-05018-421418
	:	
CUMBERLAND CONTURA, 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 14, 2017, the Commission received from Cumberland Contura, LLC (“Cumberland”) 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 October 5, 2016, and became

a final order of the Commission on November 4, 2016. MSHA records further indicate that a delinquency notice was mailed to the operator on February 7, 2017, and the case was referred to the U.S. Department of Treasury for collection on April 3, 2017. The Secretary does not oppose the motion to reopen.

On July 26, 2016, a new parent company for the operator was created as a result of the bankruptcy of Alpha Natural Resources, the operator's prior parent company. Press Release, Alpha Natural Resources, Alpha Natural Resources Successfully Emerges from Bankruptcy (July 26, 2016), <http://ir.alphanr.com/Cache/1500088921.PDF>. The operator asserts that when it received the proposed assessment several months later, it had not fully established a process for contesting penalties and that "many of the personnel who . . . oversaw and monitored civil penalty contests previously" remained with Alpha. Mot. to Reopen at 1-2. The operator suggests that its failure to timely contest the assessment at issue was a direct result of the aforementioned situation. Specifically, the operator claims that although it promptly completed the contest form on October 6, 2016, it failed to timely file the contest with MSHA because of "a new system" and "newly assigned personnel."<sup>1</sup> The operator claims that a new system for handling assessments did not become functional until December 2, 2016.

On or about February 13, 2017, the operator received a delinquency notice alerting it of its failure to pay or contest \$28,034 in penalties related to the case at hand. Cumberland claims that it "began to investigate" the failure to timely contest the penalties after receiving the delinquency notice. However, the operator took no steps to reopen the assessment at issue until being notified on or about April 13, 2017 that the matter had been referred to the U.S. Department of Treasury for collection and additional late fees were applied.

The Commission has made it 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). It is the operator's responsibility to properly train all personnel who handle proposed assessments. Each proposed assessment sets forth the deadline for contesting proposed assessments and provides clear instructions on how to file said contest with MSHA.

In determining whether inadequate procedures warrant denial of a motion to reopen, we review an operator's procedures for handling proposed MSHA assessments. We also consider the reasons for the failure of the internal processing system and the operator's efforts to correct any such flaws. Here, the operator does not explain why it needed an extended period of time to implement a functional internal processing system, or why, after implementing this purportedly functional system, it failed to take any action on the assessment for a significant period of time, even after receiving a delinquency notice. In the absence of such explanation, the multiple

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<sup>1</sup> The operator paid the uncontested penalties with a check. However, this check was not issued until January 12, 2017, two months after the assessment had become a final order of the Commission.

failures of the operator's internal processing system between July 2016 and April 2017 indicate that the operator made little, if any, effort to correct flaws in its internal procedures.


We find that the operator failed to implement a functional system for handling proposed assessments despite having ample opportunity to do so. The assessment was delivered in October, several months after the creation of the operator's parent company. Therefore, before the assessment was delivered, the operator had ample time to implement a functional system for contesting penalties. Yet, for more than four months, Cumberland continued to operate its mine without fully establishing contest procedures. The operator does not provide any reason as to why it needed an extended period of time to implement a functional system for contesting penalties.


Furthermore, we are troubled that, after purportedly implementing a functional system for handling assessments, the operator nevertheless failed to take any action regarding the assessment for a significant period of time. The new system for handling proposed penalties was implemented by December 2, 2016. However, the operator failed to file a motion to reopen until April, despite the fact that the assessment concerned approximately \$28,000 in penalties. Moreover, there is no evidence that the operator made any effort to contact MSHA between December and April regarding the status of the assessment. The operator's long delay in taking any action on a large penalty assessment belies its claim that its system became "fully functional" in December.

Moreover, we find no explanation for the operator's delay in responding to the delinquency notice. We have long held that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC at 1316-17. Here, the operator received a delinquency notice on or about February 13, 2017. However, it did not respond to this notice until April 14, a day after receiving a collections notice from the Department of Treasury. The operator does not bother to explain why it waited two months to respond to the delinquency notice.

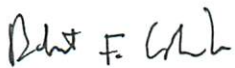
The evidence suggests that the operator's internal system for handling penalties failed during three distinct time periods—when it received the proposed assessment, then when it implemented its new functional processing system, and then again when it received the delinquency notice. The operator does not provide a sufficient excuse for such failures or any evidence of efforts to correct such flaws in the system. Therefore, given the multiple unexplained failures of the internal system, we must conclude that the operator's failure to contest the assessment at issue was a direct result of an inadequate or unreliable internal processing system.

Accordingly, we find that the operator has failed to demonstrate an entitlement to extraordinary relief, and thus we deny Cumberland's motion.

  
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William I. Althen, Acting Chairman

  
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Mary Lu Jordan, Commissioner

  
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Michael G. Young, Commissioner

  
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Robert F. Cohen, Jr., Commissioner

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