FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET N.W., 6TH FLOOR
WASHINGTON, D.C. 20006

November 28, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 95-596
	:	A. C. No. 15-17077-03543
v.	:	
	:	RB No. 5 Mine
R B COAL COMPANY, INCORPORATED, Respondent	:	

DECISION TO REOPEN
ORDER TO FILE PENALTY PETITION

Appearances: Mark Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Richard D. Cohelia, R B Coal Company Inc., Pathfork, Kentucky, for Respondent.

Before: Judge Merlin

The issue presented is whether the operator may be allowed to proceed to a hearing on the merits of its claim or whether the case should be dismissed because the operator did not request a hearing within the period allowed by the Mine Act and Commission regulations.

On November 28, 1994, an inspector of the Mine Safety and Health Administration issued to the operator Citation No. 4247308 under section 104(d) of the Act, 30 U.S.C. ' 814(d). On the same date the operator was also issued Order No. 4247309 under section 104(d). Thereafter, on March 23, 1995, the Mine Safety and Health Administration issued a Notice of Proposed Assessment for the subject citation and order as well as for a citation issued under section 104(a).[1] The notice advised the operator that it had 30 days from the date it received the proposed assessment to either pay or notify MSHA that it wished to contest the proposed assessment and was requesting a hearing. The notice further told the operator that if it did not exercise these rights within 30 days, the proposed assessment would become a final order of the Commission. The notice was mailed certified mail return receipt requested and received by the operator on March 28, 1995.

The 30th day from the date of the operator=s receipt of the

[1]The 104 (a) citation was paid and is not involved in this case.

proposed assessment was April 27, 1995. MSHA=s Civil Penalty Compliance Office received a request for hearing from the operator which is date stamped May 26, 1995. The hearing request is signed and dated May 12, 1995, by the operator=s engineer. On June 8, 1995, MSHA wrote the operator that the proposed assessment was final and that the hearing request could not be honored because the case had not been timely contested.

On June 16, 1995, the operator through its engineer wrote the Commission seeking permission to contest these civil penalty assessments. The operator admitted that it had failed to contest the assessments within the 30 day period specified in section 105(a) of the Act, 30 U.S.C. ' 815(a), and section 2700.26 of Commission regulations, 29 C.F.R. ' 2700.26. According to the engineer=s letter, the hearing request was not filed on time because it was misplaced in the paperwork of numerous assessments. The letter further stated that the company had just recently begun implementing a program aimed at contesting citations which it considered excessive and that it was learning by trial and error, because it would be more expensive to hire an attorney than pay the assessments.

On July 18, 1995, the Commission issued an order treating the operator=s letter as a petition for discretionary review and stated that it was unable to evaluate the merits of the operator=s position. Therefore, it remanded the case for a determination whether relief was appropriate under applicable criteria. 17 FMSHRC 1110.

On July 25, 1995, I issued an order requiring the Solicitor to show cause why the case should not be assigned to an Administrative Law Judge for disposition on the merits. Thereafter, on August 14, 1995, the Solicitor filed a response to the order to show cause, asserting that the operator had not demonstrated that it was entitled to relief and arguing that even if the reasons advanced justified relief, they were not presented in such a manner as to obviate the need for a hearing.

Attached to the Solicitor=s motion were copies of the citation and order issued to the operator for the alleged violations which had been designated significant and substantial and due to unwarrantable failure. Also attached was a copy of the notice of the proposed assessment, dated March 23, 1995, together with the assessment sheet. The first alleged violation was assessed at $1,200 and the other at $1,500.

A notice of hearing was issued on September 28, 1995, and a hearing was held on November 1, 1995.

At the hearing the operator=s engineer testified that he is the individual at the mine who is served with citations and orders, receives the notices of proposed assessments, and decides whether to pay or contest them (Tr. 5-6, 10-11). He is the only person at the mine who performs these tasks. Because the operator is small with only 100 to 120 total employees and in view of the present state of mining, he has many other duties to perform (Tr. 16, 58). These other duties include training new employees, performing surveys, taking dust samples, inspecting sections before the MSHA inspector comes and accompanying the inspectors on their inspections (Tr. 5-6, 16). After receiving a citation he disagrees with, the engineer has a closeout conference with the inspector and if the matter remains unresolved, a health and safety conference is held and if a resolution is not reached, he requests a hearing before the Commission (Tr. 6-7). All citations issued by an inspector on the same day do not come on the same proposed assessment notice (Tr. 8). If a citation is going to be paid, the engineer tries to stagger payments depending upon the operator=s cash position at the particular time so that a few are paid at a time (Tr. 12). Therefore, citations he decides to pay are not always forwarded immediately to the operator=s corporate office for payment (Tr. 12). If he decides to appeal to the Commission, he also staggers mailing hearing requests so that hearings will not all be at the same time (Tr. 28, 47-48). Due to his other responsibilities he cannot spend all his time during a given period contesting citations (Tr. 16). According to the engineer, the operator routinely contests citations and orders issued under section 104(d) of the Act, supra, because it disagrees with the findings of significant and substantial and unwarrantable failure (Tr. 7, 30). Also the assessments in these cases are expensive and significant and substantial findings count toward their Apattern of violations@ under section 104(e), 30 U. S. C. ' 814(e) (Tr. 32). In the engineer=s opinion these findings have been excessive and he has been successful in having them changed and securing settlements (Tr. 30-31, Op. Exh. No. 3). He does not necessarily let 104(a) citations slide either (Tr. 11).

The engineer testified that two or three months before he received the notice of proposed assessment in this case, he obtained a new computer (Tr. 8-9). When he received this notice, he was entering on the computer citations and notices of assessment back to 1993 (Tr. 25, 51). For each case he enters the citation number, the assessment control number, dollar amount, prior action, and status (Tr. 9-10, Op. Exh. No. 3). This case is the only time he failed to request a hearing timely (Tr. 59-60). After the late filing in this case, he purchased additional

software whereby he now has a daily calender and can bring up deadlines (Tr. 49-50). If he had had this software when he received this notice, he would not have been late (Tr. 50).

The engineer explained that it is his practice to put contested citations in a file cabinet with their number on the file (Tr. 27). Citations that are to be paid are placed in a basket on his desk to be taken to the corporate office at Brookside which is 40 miles away (Tr. 10-11, 25). He circles the citations he is going to contest and leaves a note for the ones to be paid (Tr. 37, Gov:t. Exh. 1). He knew when he first saw the 104(d) citation and order in this case that they would be appealed (Tr. 28). At that time he was working on about 20 assessment sheets (Tr. 14-15). He could have filled out the explanation portion of the hearing request entered the data on the same day he received the proposed assessment, a couple of days later or even 15 days later (Tr. 28-29, 38-40). Several orders were issued by the inspector at that particular time and the engineer tried to space them out (Tr. 29). He does not dispute the date of receipt as March 28 and said that the return receipt card had been signed by an individual who works in the warehouse (Tr. 34-35). Subsequently, on May 12 he signed the hearing request and gave it to be mailed (Tr. 42-43). As already stated, he staggers hearing requests so that all the hearings will not occur at the same time, and he did not intend this request to be late (Tr. 48). The engineer did not know why the request was mailed almost two weeks after he signed it (Tr. 33). When he signs a request for hearing he gives it to the office worker to mail (Tr. 33-34). He subsequently found the request for hearing in the basket for assessments to be paid, which was the wrong pile (Tr. 25, 29, 49). Mail goes to several different places and may have been put in the wrong pile or misplaced (Tr. 47). The individual working in the office who is responsible for mailing is a miner:s widow and does not know too much about secretarial work (Tr. 46). She just more or less answers the telephone (Tr. 34). She could have sent the hearing request to Brookside by mistake (Tr. 47).

According to the engineer, all citations issued on the same day do not come out in the same notice of proposed assessment and assessment sheet (Tr. 8). The number of notices and assessment sheets vary (Tr. 8). As previously set forth, the citation and order at issue were included in the notice of proposed assessment, and constitute the items in this docket number. However, on November 28, 1994, the day these items were issued, two more citations also were issued (Tr. 29, Op. Exh No. 2). All these

items were considered at the same Health and Safety Conference (Tr. 17 Op. Exh. No. 2). However, the other two citations were in a different notice of proposed assessment and therefore, when a hearing was requested for them, they were in a different docket number (Tr. 18). I take official note that according to Commission records the docket number for those citations is KENT 95-343 and that the Secretary=s penalty petition there was filed late by a Conference and Litigation Representative (ACLR@), 29 C.F.R. ' 2700.28. The reasons given for the late filing were the newness of the CLR program in which non lawyer MSHA employees represent the Secretary in selected cases, and the confusion of the CLR over the correct contest date. On May 26, 1995, I accepted the explanations offered and issued an order accepting the Secretary=s petition. I noted that the CLR program represents a new approach which I had approved in prior cases. I also pointed out that the operator was not prejudiced by the delay. Subsequently those cases were settled (Tr. 19, 21).

Section 105(a) of the Act, supra, provides that an operator has 30 days within which to notify the Secretary that it wishes to contest the citation or proposed assessment. If within 30 days of receipt of the Secretary=s notification, the operator fails to notify the Secretary that it intends to contest the citation or proposed assessment, the proposed assessment becomes a final order of the Commission. Id. In Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993), the Commission held that it has jurisdiction to decide whether final judgments can be reopened.

Commission Rule 1(b) provides that the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure. 29 C.F.R. ' 2700.1(b). In its July 18 order, the Commission once again stated that it possesses jurisdiction to reopen uncontested assessments which have become final under section 105(a), supra, and that these determinations are made with reference to Federal Rule 60(b). Federal Rule 60(b)(1) provides as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party=s legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect * * *.

In Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 113 S. Ct. 1489 (1993), 123 L.Ed 2d 74, the Supreme Court recognized that Bankruptcy Rule 9006(b)(1), which contains the same Aexcusable neglect@ standard as Rule

60(b)(1), grants a reprieve for out-of-time filings delayed by Aneglect@. 123 L.Ed 2d at 85. In interpreting this provision, the Court first turned to the ordinary meaning of Aneglect@, which it said was to give little attention or respect to a matter or to leave undone or unattended to, especially through carelessness. Id. The Court said that the word Aneglect@ therefore, encompassed both simple, faultless omissions to act and, more commonly, omissions caused by carelessness. Id. The Court further held that absent sufficient indication to the contrary courts assume that Congress intends words in its enactments to carry their ordinary contemporary common meaning. Id. Consequently, based on the plain meaning of neglect, the Court rejected an inflexible approach that would exclude every instance of inadvertent or negligent omission. Id. at 89.

With respect to the meaning of excusable neglect the Court in Pioneer stated as follows:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered Aexcusable,@ we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party=s omission. These include,. . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. at 89.

Many Courts of Appeals have acknowledged and followed the test set forth in Pioneer. It has been explicitly recognized that the decision in Pioneer represented a change from prior law and adopted a new and more lenient interpretation. U.S. v. Hooper, 9 F.3d 257 (2nd Cir. 1993); Matter of Christopher, 35 F.3d 232 (5th Cir. 1994); U.S. v. Clark, 51 F.3d 42 (5th Cir. 1995); Reynold v. Wagner, 55 F.3d 1426 (9th Cir. 1995); City of Chanute, Kansas v. Williams Nat. Gas Co., 31 F.3d 1041 (10th Cir. 1994); Information Systems and Networks Corp. v. U.S., 994 F.2d 792 (Fed. Cir. 1993). See also, In Re SPR Corp., 45 F.3d 70 (4th Cir. 1995). Although Pioneer was a case that arose under the bankruptcy rules, it has been applied beyond the context of bankruptcy to other situations where pertinent rules contain the

same standard of Aexcusable neglect@. U.S. v. Hooper, supra at 259; U.S. v. Clark, supra at 44; Reynold v. Wagner, supra at 1429; Information Systems and Networks Corp. v. U.S., supra at 796.

Applying the criteria of Pioneer, I find first that there will be no prejudice to the Secretary if the operator is allowed to proceed on the merits. There has been no allegation that the delay which occurred here will hinder the Secretary in the presentation of his case on the merits. In addition, a trial on the merits is always favored over default. Information Systems and Networks Corp. v. U.S., supra at 795. The fact that the operator was not represented by counsel is another factor to be taken into account. As described above, the operator=s engineer testified how he treats citations, notices of proposed assessments, and requests for hearing. I found him truthful and credible. His methods were sensible and obviously undertaken in good faith. That he was in the process of computerizing his records and that there were a large number of cases going back to 1993 are relevant circumstances. Most importantly, this is the only time this small operator has been out of time in requesting a hearing. Nor do I believe reopening this case will have an adverse impact on Commission proceedings given the circumstances and the short delay involved. After balancing all the above factors and bearing in mind the Supreme Court=s admonition that the determination of what sorts of negligence are excusable is at bottom an equitable one, I conclude that the operator=s late filed hearing request should be allowed and the case reopened.

This conclusion is also consistent with Commission precedent. In vacating defaults and remanding cases for determination whether reopening is warranted, the Commission has repeatedly reminded its Judges that default is a harsh remedy. See, e.g., A.H. Smith Stone Company, 11 FMSHRC 796, 798 (May 1989). The Commission itself has ordered a case reopened under Rule 60(b)(1) where the operator did not timely file an appeal, relying upon the fact that the operator was without benefit of counsel. C&B Mining Company, 15 FMSHRC 2096, 2097 (Oct. 1993). In its remands the Commission has considered the absence of counsel in the forefront of relevant reasons that could justify reopening. Kelley Trucking Company, 8 FMSHRC 1867, 1868 (Dec. 1986). See also, CG&G Trucking, Inc., 15 FMSHRC 193 (Feb. 1993); Mustang Fuels Corporation, 13 FMSHRC 1061, 1062 (July 1991). The Commission has also recognized that an operator proceeding without counsel may be entitled to relief when serious personal problems are responsible for the untimeliness. James D. McMillen, Employed by Shillelagh Mining Company, 13 FMSHRC 778, 779 (May 1991). The absence of bad faith is another factor which should be taken into account. Kenneth Howard v. B & M Trucking,

11 FMSHRC 499, 500 (April 1989). All the foregoing factors support a reopening in the instant matter.

It is clear that this case is an isolated instance where the operator slipped up. As appears above, I have excused the Secretary=s own late filing in the companion case. The grounds here for operator relief are at the very least equally persuasive as those advanced by the Secretary in the companion case and in many other such cases where the Secretary seeks to have his late filings allowed. Salt Lake County Road Department, 3 FMSHRC 1714; Rhone-Poulenc of Wyoming Company, 15 FMSHRC 2089 (Oct. 1993) aff=d, 57 F.3rd 982 (10th Cir. 1995); Roberts Brothers Coal Company, Inc., 17 FMSHRC 1103 (June 1995); Lone Mountain Processing, Inc., 17 FMSHRC 839 (May 1995); Ibold Inc., 17 FMSHRC 843 (May 1995); Long Branch Energy, 16 FMSHRC 2192 (Oct. 1994); Southmountain Coal Company, Inc., 15 FMSHRC 2421 (Nov. 1993); Power Operating Company Incorporated, 15 FMSHRC 931, (May 1993).

The operator however, is cautioned that if in the future it should be late in filing the equities might not be in its favor. The operator is now on notice that some of its procedures, including mailing, need improvement.

The parties have filed post-hearing briefs and statements. To the extent they are inconsistent with this decision, they are rejected. The Solicitor appears unaware of Pioneer and the decisions that follow it.

In light of the foregoing, it is **ORDERED** that this case be **REOPENED**.

It is further **ORDERED** that within 45 days of the receipt of this order, the Solicitor file the penalty petition for this case.

Paul Merlin
Chief Administrative Law Judge

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