

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

May 02, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2013-409
v.	:	A.C. No. 41-04085-311359
	:	
LUMINANT MINING COMPANY, LLC	:	

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

ORDER

BY: Jordan, Chairman; Young, Nakamura, and Althen, 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 April 18, 2013, the Commission received from Luminant Mining Company, LLC (“Luminant”) 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).

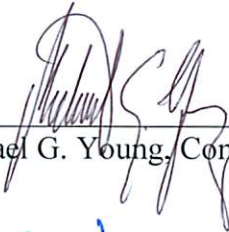
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final orders, the Commission 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 January 16, 2013, and became a final order of the Commission on February 15, 2013. MSHA mailed a delinquency notice on April 2, 2013. Luminant asserts that its administrative assistant was on vacation and inadvertently overlooked the assessment upon her return. The Secretary does not oppose the request to reopen and urges the operator to adopt procedures to ensure that the absence of administrative personnel will have no effect on filing timely penalty contests.¹


Having reviewed Luminant’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.



Mary Lu Jordan, Chairman



Michael G. Young, Commissioner



Patrick K. Nakamura, Commissioner



William I. Althen, Commissioner

¹ The dissent has correctly noted that we have held that inadequate or unreliable internal processing systems do not constitute excusable neglect. While Luminant is making its fifth motion to reopen in the past five years, that amounts to one motion per year for a large operator. We cannot determine, on this basis alone, that Luminant’s procedures are inadequate. However, its motions have provided the bare minimum by way of explanation. It is not too much to expect that a sophisticated operator will provide safeguards to ensure penalties are timely contested, and subsequent failures to do so, unless more adequately explained, may be viewed as an inexcusable pattern of neglect.

Commissioner Cohen, dissenting:

I dissent from my colleagues because I believe that Luminant Mining has not established good cause to reopen the subject civil penalty case.

As grounds to reopen the proceeding, Luminant states that an administrative assistant inadvertently overlooked the proposed assessment because it arrived at their office on a day when she was on vacation. Mot. at 1. The operator's motion provides no details of the assistant's absence, such as the dates she was out of the office. The operator does not describe any office procedures in place to accommodate staff absences. Moreover, no affidavit accompanied the motion to verify the facts alleged.

Luminant's lack of diligence in handling this proposed assessment is not an isolated incident, but rather it seems to be part of a pattern of behavior. Its April 2013 motion was the fifth motion to reopen a penalty proceeding that it has filed in a five year period. *See Luminant Mining Co., LLC*, 33 FMSHRC 2135 (Sept. 2011); 33 FMSHRC 1041 (May 2011); 31 FMSHRC 1026 (Sept. 2009); 31 FMSHRC 58 (Jan. 2009). In each of the five motions, the operator alleges that due to the inadvertence of its personnel it failed to timely contest a proposed penalty assessment.²

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). In examining the operator's asserted justifications for reopening a particular case, the Commission has also explored whether the

² On September 2, 2008, the Commission received a motion to reopen a penalty proceeding from Luminant that stated that "due to the inadvertence and mistake by Company personnel, the proposed assessment form . . . was not processed in a timely manner by its personnel." 31 FMSHRC 58; Mot. at 1. On December 22, 2008, the Commission received a motion from Luminant that stated that "as a result of [an] internal miscommunication, it failed to timely request a hearing on the penalty and that such inadvertence or mistake constitutes good cause to reopen the penalty proceeding." 31 FMSHRC 1026; Mot. at 2-3. On December 10, 2010, the Commission received a motion from Luminant that states that "[through the inadvertence or mistake of a new employee] it failed to timely request a hearing on the penalty and that such inadvertence or mistake constitutes good cause to reopen the penalty proceeding." 33 FMSHRC 1041; Mot. at 2. On July 15, 2011, the Commission received a motion that stated that Luminant failed to timely contest a proposed assessment because it did not realize that citations and orders that arose from an investigation were assessed in two different proposed assessment forms. 33 FMSHRC 2135; Mot. at 2.

operator has demonstrated a pattern of behaviors that are attributable to inadequate or unreliable internal processing systems in other cases. *See Oak Grove Res., LLC*, 33 FMSHRC 2378, 2379-80 (Oct. 2011).

I find Luminant's conclusory contention of inadvertence or mistake to be insufficient and that the operator has not established good cause to reopen the proceeding. Moreover, I conclude that based on Luminant's own submissions, it has demonstrated a pattern of document mismanagement which results from an inadequate or unreliable internal processing system. Luminant is a large operator which should have the resources to adequately process mail in the absence of a single employee.

Therefore, I would deny its motion to reopen.

A handwritten signature in blue ink, appearing to read "Robert F. Cohen, Jr.", is written above a horizontal line.

Robert F. Cohen, Jr., Commissioner

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