

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 1, 2011

SECRETARY OF LABOR,	:	Docket No. CENT 2010-1273-M
MINE SAFETY AND HEALTH	:	A.C. No. 13-02297-225215
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2010-1302-M
v.	:	A.C. No. 13-02297-215099
	:	
PATTISON SAND COMPANY, LLC	:	Docket No. CENT 2010-1642-M
	:	A.C. No. 13-02297-221933

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On August 10, September 17, and September 20, 2010, the Commission received motions by counsel for Pattison Sand Company, LLC (“Pattison”) seeking to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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).

On March 29, 2010, June 9, 2010, and July 7, 2010, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment Nos. 000215099, 000221933, and 000225215, respectively, to Pattison, proposing civil penalties for various citations. Pattison states that its mine has been inspected numerous times in 2010, which has resulted in the issuance of a large number of citations and orders. Regarding Proposed

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2010-1273-M, CENT 2010-1302-M, and CENT 2010-1642-M, all captioned *Pattison Sand Company, LLC*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

Assessment Nos. 000215099 and 000225215, the operator submits that the proposed penalty assessments were “missed” or “slipped through the cracks.” Pattison explains further that it has no record of receiving either proposed penalty assessment.

The Secretary opposes Pattison’s request to reopen Proposed Assessment Nos. 000215099 and 000225215. She notes that MSHA’s records indicate that Pattison received Proposed Assessment Nos. 000215099 and 000225215 on April 1, 2010, and July 14, 2010, respectively. The Secretary asserts that the operator’s receipt of a large number of citations does not constitute an excuse for the operator’s failure to timely contest the proposed assessments. With respect to Proposed Assessment No. 000215099, the Secretary further notes that although a delinquency notice was sent to the operator on June 30, 2010, the operator did not file the reopening request until almost three months later.

Regarding Proposed Assessment No. 000221933, the operator states that it initially misplaced the assessment form. However, Pattison found the proposed assessment form on July 7, 2010, and then immediately forwarded the form by email to its counsel with instructions to contest the proposed penalties. The operator states that its counsel was on vacation from July 9 through July 18 and did not notice the operator’s email until her return. The Secretary does not oppose reopening Assessment No. 000221933.

We have held 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

Having reviewed Pattison’s requests to reopen and the Secretary’s responses, we conclude that Pattison has failed to provide an adequate basis for the Commission to reopen the three penalty assessments. Pattison’s requests do not adequately explain the company’s failure to contest the proposed assessments on a timely basis. At a minimum, the operator must provide a more detailed explanation of how it normally contests proposed penalties and specific information regarding why that process did not work in these instances. For instance, it is not clear why the operator’s email regarding Assessment No. 000221933 was not received until after July 18 although the email was sent on July 7 and its counsel did not leave for vacation until July 9. Furthermore, in considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator’s receipt of a delinquency notice and the operator’s filing of its motion to reopen.

See, e.g., Left Fork Mining Co., 31 FMSHRC 8, 11 (Jan. 2009). Although the Secretary's response raised the issue that Pattison failed to explain why, after it was informed of the delinquency regarding Proposed Assessment No. 000215099, it took as long as it did to request reopening, the operator did not file a reply providing an explanation.²

Having reviewed Pattison's requests and the Secretary's responses, we conclude that Pattison has not provided the Commission with an adequate basis to reopen. *See, e.g., C.S.A. Mining, Inc.*, 31 FMSHRC 773, 775 (July 2009). Accordingly, we deny without prejudice Pattison's requests to reopen. Any amended or renewed request by Pattison to reopen the assessments must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

² We encourage parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary's response. *See, e.g., Climax Molybdenum Co.*, 30 FMSHRC 439, 440 n.1 (June 2008). Accordingly, where the Secretary raises the issue of the delay between receipt of a delinquency letter and the filing of the request to reopen, an operator who does not explain why, after it was informed of a delinquency, it took as long as it did to request reopening, does so at its peril.

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