FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 29, 2011

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 2011-210-M A.C. No. 25-01010-229138
OVERTON SAND & GRAVEL COMPANY	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On November 29, 2010, the Commission received from Overton Sand and Gravel Company ("Overton") a motion by counsel 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 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).

On July 7, 2010, MSHA issued seven citations to Overton. The operator believed that the citations contained such "egregious factual errors" that it immediately contacted MSHA and requested a conference. Mot. at 2. MSHA replied by letter dated August 2, 2010, informing Overton that a conference would be scheduled afer the penalties had been received and contested. Proposed Assessment No. 000229138, containing five of the seven citations, was issued on August 18, 2010, and delivered to Overton by Federal Express on August 25, 2010.[1] In October 2010, after not hearing from MSHA, the operator contacted MSHA to repeat its request for a conference. On November 3, 2010, Overton received a call from the MSHA Conference and Litigation Representative (CLR), who again informed the operator that it needed to send back its contest information. At some point thereafter, Overton discovered that the time to contest the penalties had passed.

Overton asserts that it is a small operator, and being unfamiliar with MSHA's contest procedures, its personnel erroneously believed that its letter requesting a conference to discuss the citations preserved its rights. Overton then states that it believes it missed the initial penalty assessment because its personnel coordinator was transferred from the Overton office in August and the remaining personnel failed to forward the MSHA mail because they were instructed to look for mail from the Rocky Mount MSHA District office. Overton contends that it always intended to contest the citations.

The Secretary opposes the request to reopen and responds that, not only did Overton receive the proposed assessment on August 25, 2010, but that it was previously informed by MSHA that a conference would not be scheduled until after the operator received and contested the proposed assessment. The Secretary argues that the operator's confusion is "inexcusable given the crystal clear instructions" provided in both the letter and the assessment form. S. Resp. at 4.

Following Overton's request for a conference, MSHA informed the operator by letter that a conference would be scheduled after the penalties were assessed and its contest received. The letter went on to explicitly warn Overton that its "request for a Part 100 Safety and Health Conference does not constitute a contest of the proposed civil penalties, and does not alter the requirements for filing such a contest . . . ." Mot. at Ex. D.

Having reviewed Overton's request to reopen and the Secretary's response thereto, we conclude that the operator has failed to provide a sufficient basis for the Commission to reopen the penalty assessment. In particular, Overton has failed to explain the circumstances surrounding the transfer of its personnel coordinator, including exactly when the transfer

[1] The two remaining citations were separately assessed on October 13, 2010, as proposed Penalty Assessment No. 000235394 and timely contested.

occurred and the specific impact the transfer had on Overton's ability to timely contest the proposed assessment. Accordingly, we hereby deny without prejudice Overton's request to reopen. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that Overton may submit another request to reopen Assessment No. 000229138.[2] Any amended or renewed request by the operator to reopen this assessment must be filed within 30 days of this order. If an amended motion is not submitted within 30 days, this matter is dismissed with prejudice, regardless of the merits.

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

[2] If Overton submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Overton should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen.

Chairman Jordan and Commissioner Duffy, dissenting in part:

Overton failed to timely contest the penalties at issue in this case. It now asks the Commission to reopen these proceedings. In his affidavit, Overton's president and owner states that the operator had a mistaken belief that it preserved its rights when it sent a letter to MSHA requesting a conference on the underlying citations. He adds that the operator also failed to timely contest the penalties because it thought it "should be looking for an envelope from the Rocky Mountain District Office." Although not included in this affidavit, Overton's counsel also asserts that a personnel transfer also contributed to the error. We conclude that these excuses do not merit relief under Rule 60(b).

The operator received clear notice of the need to send in the assessment form to contest the penalties and preserve its rights, not once, but two times before the deadline to file a contest. The penalty assessment form received by Overton on August 25, 2010, stated that the operator had 30 days after receipt of the form to either pay the penalty or request a hearing and contest the proposed assessment by mailing the form to MSHA in Arlington, Virginia. Not only did the proposed assessment itself advise Overton of its duty to contest the assessment within thirty days, but in addition, MSHA's Conference Litigation Representative had previously notified the operator in an August 2, 2010 letter that in order to contest the penalties, the assessment form would need to be returned to the address shown on the form. This letter also made clear that a conference would only be scheduled after the penalties had been contested, and that the operator's request for a conference did not alter the requirement for filing a penalty contest.

Given Overton's admission that it believed it did not need to contest the penalties (because it had sent a letter requesting a conference on the citations), we do not see the relevance of the transfer of its personnel coordinator. Even if he or she had not been transferred, because Overton thought it had already preserved its rights by requesting a conference, it appears that the presence or absence of this staff member would have made no difference to how the operator reacted once the penalty was received.[1] Thus the majority's invitation to Overton to explain the impact the transfer had on its ability to timely contest the proposed penalties seems superfluous.

Having reviewed Overton's motion and the Secretary's response, we would deny the operator's request with prejudice. The Secretary twice provided clear instructions to Overton regarding the necessity of filing a timely penalty contest. Consequently, this is not a situation in which it should be provided with another opportunity to expand on its failure to contest the

[1] Similarly, the fact that Overton's staff had been instructed to look for mail from the Rocky Mount District Office to forward to the Lexington office appears irrelevant in light of Overton's belief that it need not contest the penalties once it had requested a conference. Moreover, it is undisputed that it received the penalty assessment from MSHA via FedEx on August 25, 2010. Even if staff had been alerted to forward mail from MSHA's Rocky Mount District Office, this did not relieve the operator of properly contesting the proposed assessment once the form had actually been received.

penalty. *See Extra Energy, Inc.*, 31 FMSHRC 377, 379-80 (Apr. 2009) (denying the request to reopen when the operator's sole excuse for not filing timely notices of contest was that its representative was instructed to file the contests and failed to do so because a telephone call was not returned); *Left Fork Mining Co.,* 31 FMSHRC 8, 10 (Jan. 2009) (denying the request to reopen because the operator's conclusory statement that its failure to timely file was due to inadvertence or mistake did not provide an adequate basis to justify reopening).

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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