# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | :<br>:<br>: | Docket No. KENT 2009-1101<br>A.C. No. 15-19180-176388 |
| v. | : | |
| M3 ENERGY MINING COMPANY | : | |
| and | : | |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | :<br>:<br>: | Docket No. KENT 2009-1102<br>A.C. No. 15-10753-176367 |
| v. | : | |
| CLEAN ENERGY MINING COMPANY | : | |

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

## ORDER

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On May 22, 2009, the Commission received from M3 Energy Mining Company ("M3 Energy") a motion made by its counsel, Dinsmore & Shohl LLP ("Dinsmore"), 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). Also on May 22, 2009, the Commission received from Clean Energy Mining Company ("Clean Energy") a motion made by Dinsmore 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). The Secretary has not opposed either the M3 Energy or Clean Energy motions.

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. *Id.*

The circumstances of the M3 Energy and Clean Energy cases are identical. As the motions state, they were filed contemporaneously. Except for the company names and the case numbers, the two motions are identical. The individuals involved in the two cases are the same people, and the relevant actions are the same in both cases. The companies are sister companies with the same controller, Massey Energy Corporation, according to the Secretary's Mine Data Retrieval System, and they share the same address. Hence, we will consider these cases together.[1]

On February 11, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 176388 to M3 Energy, proposing civil penalties for certain citations. On the same day, MSHA issued Proposed Assessment No. 176367 to Clean Energy. The proposed assessments were not contested in either case. MSHA issued notices of delinquency to M3 Energy and Clean Energy pertaining to the above proposed assessments on May 12, 2009.

The two motions state, with respect to Proposed Assessment Nos. 176388 and 176367, that Steve Endicott, Safety Director for both companies, faxed the proposed assessments to Dinsmore on February 25, 2009.[2] The motions allege that although the proposed assessments were faxed to Dinsmore by Mr. Endicott, they were "apparently not received." The motions further state that at the time the proposed assessments were faxed, Dinsmore had a temporary receptionist, and that there is no record of receipt of the faxes in counsel's facsimile log. The motions state that Mr. Endicott did not learn that the penalties had not been contested until he received MSHA's May 12, 2009 delinquency notices.

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.

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[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate Docket Nos. KENT 2009-1101 and KENT 2009-1102, as the dockets involve similar procedural issues and factual backgrounds. 29 C.F.R. § 2700.12.

[2] Attachment 2 to both motions is the identical page containing a fax "transmission verification report" relating to Proposed Assessment No. 176388 issued to M3 Energy. Although we have not received documentation of the faxing of the proposed assessment issued to Clean Energy, we will assume that it was faxed at the same time, as alleged. The "transmission verification report" indicates that the fax went through without problem.

*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).

However, the Commission has also 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 shown grounds for reopening the assessment. *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co.,* 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Elk Run Coal Co.,* 32 FMSHRC 1587, 1588 (Dec. 2010); *Oak Grove Res. LLC*, 33 FMSHRC 103, 104-05 (Feb. 2011); *see Gibbs v. Air Canada*, 810 F.2d 1529, 1537-38 (11th Cir. 1987).

The reasons offered by M3 Energy and Clean Energy do not amount to mistake, inadvertence or excusable neglect within the meaning of Fed. R. Civ. P. 60(b), and do not constitute good cause to reopen final orders of the Commission. The motions from M3 Energy and Clean Energy show a lack of documentation and a pattern of inadequate office procedures on the part of the companies and their counsel.

The assertion that Dinsmore did not receive the two assessments faxed on February 25, 2009 is not supported by sufficient documentation. The motions are accompanied by an affidavit from Sue Smith, Dinsmore's regular receptionist who was on a six-week sick leave on February 25, 2009. However, Ms. Smith has no personal knowledge of events that day, and her affidavit does not claim any direct knowledge. The motions do not contain affidavits from Mr. Endicott, his administrative assistant Pat Pinson whose name appears on the proposed assessments with the notation that she faxed them on February 25, 2009; the temporary receptionist who was replacing Ms. Smith; or anyone else at Dinsmore who was responsible for office procedures that day. The only evidence offered is Dinsmore's redacted "facsimile log," which purports to show the faxes received on February 25 and 26, 2009, and does not specifically include faxes from M3 Energy or Clean Energy. However, Dinsmore's "facsimile log" does not appear to have been kept in a reliable manner, and some of the information provided does not appear to be accurate.[3]

[3] An inspection of the facsimile log reflects confusion between a column that is headed "Sender" and the column headed "Names." Some logged faxes do not have a sender listed. Other columns have not been completed. The manner in which faxes are logged in does not clearly indicate which faxes were received on February 25 and which were received on February 26. Entries are not all in chronological order. Review of the log suggests that at least some documents were not logged in at the time they were received, but were logged in together at a later time.

If these were isolated instances of inadequate office procedures, the Commission might consider granting the requested relief. However, the entities and individuals involved in these cases have demonstrated a pattern of failing to deal adequately with proposed assessments received from MSHA.

On April 30, 2008, the Commission issued orders in three cases where Kentucky subsidiaries of Massey Energy (one of which was Clean Energy) failed to contest proposed assessments and requested that the Commission reopen the final orders to permit them to contest the penalties. Each of these cases reflected inadequate and unreliable office procedures, specifically the failure to transmit or receive faxes or electronic mail on the part of Dinsmore. In *Clean Energy Mining Company*, 30 FMSHRC 224 (Apr. 2008), the operator faxed the proposed penalty assessment to Dinsmore's Morgantown office, which received it. It was then supposed to have been faxed to Dinsmore's Charleston office, but apparently the transmission was not successful and thus the proposed assessment was not contested. *Id.* at 224-25; Resp't Mot. to Reopen Civil Penalty Proceeding at 1-2. In *Road Fork Development Company*, 30 FMSHRC 220 (Apr. 2008),[4] Dinsmore received the fax of the proposed assessment from Mr. Endicott. A paralegal at Dinsmore attempted to scan the assessment form and send it by electronic mail to the attorneys responsible for handling Road Fork matters, but because of an unspecified "technical failure," the attorneys did not receive the email and the contest was not filed. *Id.* at 220-21; Resp't Mot. to Reopen at 2, Attach. 1. In *Long Fork Coal Company*, 30 FMSHRC 228 (Apr. 2008),[5] the facts were identical to those in *Road Fork Development. Id.* at 228-29; Res't Mot. to Reopen at 1-2. The Commission remanded each of these cases to the Chief Administrative Law Judge ("ALJ") for good cause determinations on April 30, 2008, and all three cases were subsequently reopened. *Clean Energy Mining*, 30 FMSHRC at 226; Unpublished Order dated Sept. 4, 2008; *Road Fork Dev.*, 30 FMSHRC at 222; Unpublished Order dated Sept. 4, 2008; *Long Fork Coal*, 30 FMSHRC at 230; Unpublished Order dated Sept. 16, 2008. In all three orders, the Commission stated that this was one of three proceedings "involving the same law firm where a breakdown in office procedures has been cited as the reason for contests not being filed." *Clean Energy Mining*, 30 FMSHRC at 225 n.2; *Road Fork Dev.*, 30 FMSHRC at 221 n.2; *Long Fork Coal*, 30 FMSHRC at 229 n.2. We agreed with the recommendation of the Secretary "that counsel take steps to ensure that such breakdowns do not continue and that penalty assessments are timely contested." *Clean Energy Mining*, 30 FMSHRC at 225; *Road Fork Dev.*, 30 FMSHRC at 221; *Long Fork Coal*, 30 FMSHRC at 229.

Thus, in three separate decisions issued less than a year before the events which gave rise to the defaults in these cases, the Commission explicitly called attention to the type of problem

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[4] Road Fork Development Co. is a Massey subsidiary with the same mailing address and same Safety Director (Steve Endicott) as Clean Energy Mining. Resp't Mot. to Reopen, Attach. 1.

[5] Long Fork Coal Co. is a Massey subsidiary located in the same town as Clean Energy Mining and Road Fork Development Company. Resp't Mot. to Reopen, Attach. 1.

which caused the defaults here, and warned "that counsel take steps to ensure that such breakdowns do not continue and that penalty assessments are timely contested."

The three cases decided on April 30, 2008 were not the first cases addressing the kind of transmittal problems that are presented in the cases currently under review. In *Rockhouse Energy Mining Company*, 29 FMSHRC 380 (May 2007), Safety Director Steve Endicott marked the citations the operator wished to contest and faxed the proposed assessments to Dinsmore but omitted one page, and so the 11 proposed penalties on the missing page were not contested. *Id.* at 380. The Commission remanded the case to the Chief ALJ for a good cause determination, and the penalties were subsequently reopened. *Rockhouse Energy Mining*, 29 FMSHRC at 381; Unpublished Order dated Sept. 16, 2008.

Similar problems occurred in two cases where the defaults occurred prior to the warnings issued on April 30, 2008, but the Commission decision was issued after that date. In *Sidney Coal Company*, 31 FMSHRC 562 (May 2009), Safety Director Endicott faxed the proposed assessment to Dinsmore, but due to an "undetected mechanical failure" the assessment was not received. *Id.* at 562. The Commission remanded the case to the Chief ALJ for a good cause determination, and the case was subsequently reopened. *Sidney Coal*, 31 FMSHRC at 563; Unpublished Order dated Nov. 9, 2009. In *Freedom Energy Mining,* 31 FMSHRC 593 (June 2009), Safety Director Endicott faxed the proposed assessment to Dinsmore, but the contest was not filed. Resp't Mot. to Reopen Civil Penalty Proceeding at 1-2; Attach. The Commission denied this request to reopen, because it was filed more than one year after the proposed assessment became a final order. *Id.* at 594.

Moreover, we note that the *M3 Energy Mining* case and this *Clean Energy Mining* case are not the only cases where this type of problem occurred after the warnings contained in the three decisions issued on April 30, 2008. In *Clean Energy Mining Company,* 31 FMSHRC 370 (Apr. 2009), Safety Director Endicott gave the proposed assessment to his administrative assistant, Pat Pinson, to fax to Dinsmore but the assessment apparently was not actually faxed, and so the contest was not filed. Mot. to Reopen Civil Penalty Proceeding at 2. The Commission reopened the case. *Clean Energy Mining*, 31 FMSHRC at 372. In *Rockhouse Energy Mining Company*, 31 FMSHRC 847 (Aug. 2009), the facts of the default are identical to those in *Clean Energy Mining*, 31 FMSHRC 370. *Rockhouse Energy Mining*, 31 FMSHRC at 848; Mot. to Reopen Civil Penalty Proceeding at 2-3. The Commission remanded the case to the Chief ALJ for a good cause determination, and the case was subsequently reopened. *Rockhouse Energy Mining*, 31 FMSHRC at 849; Unpublished Order dated July 19, 2010.

Thus, in addition to the two cases herein and the three cases where the Commission issued warnings on April 30, 2008, there have been five other cases before the Commission where intended contests of proposed assessments were not filed because of inadequate or unreliable office procedures involving Safety Director Endicott and counsel Dinsmore. This pattern does not indicate reasonable diligence. *See Mammoth Coal Co.*, 33 FMSHRC ___, slip op. at 2-3, No. WEVA 2010-1423 (June 9, 2011) ("Mammoth's argument about the severe

consequences of the finality of the assessment is undercut by its failure to exercise reasonable diligence.").

The fact that many of the inadequate and unreliable office procedures in these cases occurred at counsel's office rather than the office of the operators does not affect our analysis. As the Commission noted in *Keokee Mining, LLC*, 32 FMSHRC 64, 66 n.1 (Jan. 2010), "[i]n requesting relief from a final order, a client may be held accountable for the acts and omissions of its attorney." *Keokee Mining* relied on *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 397 (1993),[6] where the Supreme Court made clear that when a party's failure to meet a deadline was caused by the actions of its counsel, and the issue is whether the party would be exonerated on the basis of "excusable neglect," the party would "be held accountable for the acts and omissions of [its] chosen counsel." This is because the party "'voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.'" *Id.* (quoting *Link v. Wabash R. Co.,* 370 U.S. 626, 633-34 (1962).

For the reasons stated herein, we conclude that these motions by M3 Energy and Clean Energy have failed to make a showing of circumstances that warrant reopening of the penalty assessments, and accordingly the motions are denied.

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Mary Lu Jordan, Chairman

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Robert F. Cohen Jr., Commissioner

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Patrick Nakamura, Commissioner

[6] *Pioneer Investment Services* involved the application of the "excusable neglect" provision of Federal Bankruptcy Rule 9006(b)(1), but the Court recognized that the "excusable neglect" standard in the Federal Bankruptcy Rule was the same as Fed. R. Civ. P. 60(b)(1). *Id.* at 393-94.

Commissioner Duffy and Commissioner Young, dissenting:

We respectfully dissent from our colleagues' denial with prejudice of the requests for relief filed by M3 Energy Mining Company ("M3") and Clean Energy Mining Company ("Clean Energy"). We find considerations in the record that weigh against denial.

In these proceedings, the safety director for M3 and Clean Energy received notices on May 12, 2009, from the Department of Labor's Mine Safety and Health Administration ("MSHA") informing the operators that they were delinquent in paying the subject proposed civil penalties and that the penalties had become final Commission orders. Mots. at 2. On May 22, 2009, the Commission received the operators' requests for relief from the final orders. We view the operators' promptness in filing its requests for relief as a factor weighing favorably toward granting relief. *See, e.g.*, *Genesis, Inc.*, 32 FMSHRC 770, 771 (July 2010).

We also find relevant that Commission precedent denying relief in instances in which the operator's failure to timely contest was due to its inadequate or unreliable internal processing system has largely developed after the time that the subject requests were filed. M3 and Clean Energy filed their requests with the Commission in May 2009, more than two years ago. Until the time of that filing, the Commission's denial of relief due to an operator's inadequate processing system, as in the *Pinnacle* orders cited by the majority (slip op. at 3), was relatively rare. Rather, in such circumstances, the Commission generally had a long history of granting relief when the operator adequately substantiated its rationale or remanding when the operator failed to substantiate its rationale. *See, e.g.*, *Texas Mining, L.P.*, 24 FMSHRC 520, 521 (June 2002) (granting relief where operator's allegations that failure to contest was due to internal mishandling and allegations were supported by affidavit); *Performance Coal Co.*, 29 FMSHRC 576, 577 (July 2007) (remanding where the operator did not substantiate allegations that problems in internal processing resulted in its failure to timely contest, and noting that the issues raised "involve fact-finding that is the province of an administrative law judge in the first instance"); *Applegate Shale*, 24 FMSHRC 495, 496 (May 2002) ("where an operator has failed to timely submit a hearing request due to internal mishandling, the Commission has remanded the matter to a judge for further consideration.") (citation omitted).

Here, M3 and Clean Energy submitted affidavits and copies of fax logs and fax transmission verification reports in an effort to support their claims that their safety director timely faxed the operators' counsel the proposed assessment forms for contest but that the forms were not received. The Secretary of Labor did not oppose the operators' requests for relief and made no argument that the documentation was insufficient to support the relief. As noted by our colleagues, Attachment 2 to Clean Energy's request to reopen Proposed Assessment No. 176367 appears to be a transmission verification report relating to a different proposed assessment. The affidavits, which support the operators' allegations, were submitted by an employee who was absent during the time of the alleged fax transmissions. We conclude that, in these circumstances, the Commission's resources would have been best served if the determination of whether the documentation is adequate to support the operators' claims had

been made by a Commission Administrative Law Judge, who is empowered to rule on offers of proof and receive any additional relevant evidence. *See* 29 C.F.R. § 2700.55.

Accordingly, for the foregoing reasons, we would have remanded these proceedings to the Chief Administrative Law Judge for a determination of whether good cause exists for the operators' failure to timely contest the penalty proposals and whether relief from the final orders should be granted.

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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