

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
SUITE 9500  
WASHINGTON, DC 20001

August 26, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 2010-1208
	:	A.C. No. 46-09183-211482
WA MINING, INC.	:	
	:	

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 July 1, 2010, the Commission received from WA Mining, Inc. (“WA”) a motion by its representative 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 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 February 16, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000211482 to WA. WA's representative, James Bowman, contends that the proposed assessment was served on WA's bookkeeper on or around February 18, who in turn faxed the assessment to Bowman, so that he could file a contest of the assessment. Bowman states that during the week of February 15, 2010, he experienced power outages due to severe weather and never received the fax. Bowman asserts that his fax machine does not produce a history of received faxes. In her affidavit, WA's bookkeeper explains that her fax machine does not produce a log and thus she has no record of the fax transmission. Bowman attributes the failure to timely file a contest here to "electrical error" beyond his control, rather than clerical error.

The Secretary opposes WA's request to reopen. She states that WA's inadequate and unreliable internal office procedures do not constitute grounds for relief under Rule 60(b). The Secretary also notes that the operator has two other delinquencies from the same time period.

Although Bowman argues that the power failures were to blame for the failure to timely contest the assessment, we cannot conclude that WA's failure amounts to mistake or inadvertence warranting relief. Assuming that WA's bookkeeper faxed the assessment as she contends in her affidavit, given the weather conditions, the frequent power outages, and the significant penalty amount at stake, all parties involved should have been more vigilant in ensuring that the paperwork was properly handled in this case. Neither the bookkeeper nor the operator, after having been consulted by its bookkeeper, confirmed Bowman's receipt and handling of the proposed assessment. Moreover, even after being notified of the delinquency, WA delayed more than a month and a half in seeking to reopen the assessment.

Based on the foregoing, we conclude that WA has failed to provide an adequate basis for the Commission to reopen the penalty assessment. *See Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062-63 (Dec. 2008) (denying relief because operator's excuse was insufficient); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067-68 (Dec. 2008) (same). Accordingly, we deny WA's request to reopen.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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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

Distribution:

James F. Bowman  
Representative  
WA Mining, Inc.  
P.O. Box 99  
Midway, VA 25878

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
1100 Wilson Blvd., Room 2220  
Arlington, VA 22209-2296

Melanie Garris  
Office of Civil Penalty Compliance  
MSHA  
U.S. Dept. of Labor  
1100 Wilson Blvd., 25<sup>th</sup> Floor  
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001-2021