

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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WASHINGTON, DC 20004-1710

**OCT 27 2016**

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),

v.

JESSE CREEK MINING, LLC

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:  
: Docket No. SE 2015-310  
: A.C. No. 01-03422-381588  
:  
:

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

**ORDER**

BY: Jordan, Chairman; Young, 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 October 14, 2015, the Commission received from Jesse Creek Mining, LLC. (“Jesse Creek”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On August 26, 2015, the Chief Administrative Law Judge issued an Order to Show Cause in response to Clayton’s failure to answer the Secretary of Labor’s July 14, 2015 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on September 28, 2015, when it appeared that the operator had not filed an answer with the Judge within 30 days.


Jesse Creek claims that it failed to timely answer the Petition for three reasons: 1) the safety director at the mine was reassigned; 2) an employee inadvertently failed to properly record receipt of the Petition, which caused the operator to inaccurately record the deadline for answering the Petition in a timely manner; and 3) counsel for the operator never received the Petition and has no record of ever receiving it. The Secretary does not oppose the request to reopen. However, he notes that the Petition was clearly mailed and delivered to both the operator and its counsel. He states that his decision not to oppose reopening in this case should not be construed as condoning inadequate office procedures or failure to take Commission procedural rules and orders seriously.

The Judge’s jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission’s procedural rules, relief from a judge’s decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision’s issuance, it becomes a final decision of the

Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). 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 will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Jesse Creek's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded 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.

  
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Mary Lu Jordan, Chairman

  
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Michael G. Young, Commissioner

  
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William I. Althen, Commissioner

Commissioner Cohen, dissenting:

I dissent from my colleagues' decision because I believe that Jesse Creek Mining, LLC has not established good cause to reopen this civil penalty case.

As grounds to reopen the proceeding, Jesse Creek asserts that the Safety Director at the mine had been reassigned and therefore was not present to process and answer the Petition for Assessment of Civil Penalty received from the Secretary. In addition, the operator stated that an "unidentifiable" office employee improperly failed to record receipt of the Petition upon delivery. Finally, counsel for the operator asserted that she had never received a copy of the Petition. The operator submits that its failure to timely contest the citations at issue in this case was an "inadvertent error" within the meaning of Rule 60(b) of the Federal Rules of Civil Procedure. Operator's Motion to Reopen, at 1.

In my view, Jesse Creek's three contentions that its failure to timely file the form was the result of excusable inadvertence are insufficient, and the operator has not established good cause to reopen the proceeding. 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). The same principle applies to an operator's failure to file an answer to a Petition for Assessment of Civil Penalty, as required by Commission Rule 29. 29 C.F.R. § 2700.29. Moreover, in examining the operator's asserted justifications for reopening a particular case, the Commission has also considered whether the 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). In the *Pinnacle* cases, we emphasized that "[r]elief under Rule 60(b) should generally not be accorded to an operator who creates and condones a system which predictably will result in missed deadlines." 30 FMSHRC at 1062; 30 FMSHRC at 1067.

With respect to the Safety Director's absence, the operator's proffered explanation is not adequate. The Safety Director was "reassign[ed] . . . to the workforce." Operator's Motion to Reopen, at 1. Such a reassignment is not an unplanned-for departure, but rather something which should cause a prudent operator to take precautions and make plans. Jesse Creek had contested four S&S citations, and was aware of the fact that the Secretary would file a Petition in the future, which would require an answer pursuant to Commission Rule 29. It had a duty to plan for the Safety Director's reassignment, and to ensure that adequate personnel were in place to handle future documents, including this Petition, received from the Secretary. The operator's motion does not provide any indication of planning by Jesse Creek to ensure the proper processing of penalty Petitions and other MSHA mailings upon the departure of the Safety Director.

In fact, the motion shows that the operator's precautions were so inadequate that the Petition was mislaid by an office employee who cannot even be identified. If any planning had

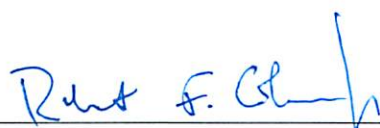
been done, Jesse Creek would presumably have known the identity of its employees who processed communications from the Secretary only a few months earlier.

Further, this inadequate processing system does not appear to be of short duration. The Secretary sent a copy of its Petition on July 14, 2015 by UPS overnight delivery, and it was never processed by Jesse Creek. Six weeks later on August 26, 2015, Commission Chief Judge Lesnick issued an Order to Show Cause. At no time during the 30-day “show cause” period set forth in the Order did the operator respond. Jesse Creek provided no explanation for its failure to respond to the Judge’s Order. Thus, months after the initial Petition was mislaid, the operator was still not properly processing its MSHA-related documents. This provides further indication that the operator’s system was legally insufficient.

The operator’s assertion that its counsel’s law firm did not receive the Petition is not substantiated. The Secretary provided tangible evidence of the delivery of a copy of the Petition in the form of a UPS receipt showing delivery to “Boatman” at the office of operator’s counsel. Despite this evidence, the operator provided no reply in support of its assertion that counsel’s law firm did not receive the Petition. In light of that un rebutted evidence, it is not appropriate to rely on the operator’s assertion with respect to the allegation of non-delivery of the Petition to counsel.

I am further convinced that good cause does not exist to reopen this case because it is not an isolated incident. This is not the only time that Jesse Creek has filed a motion to reopen claiming the same “inadvertence.” As noted above, the Secretary’s Petition in this case was sent by UPS to Jesse Creek on July 14, 2015. A month and a half later, on September 1, 2015, MSHA mailed Jesse Creek a proposed assessment which covered seven other citations and orders. Jesse Creek failed to timely contest these proposed penalties, and they became final pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). Jesse Creek has filed a motion with the Commission to reopen these penalties, asserting the exact same reason as asserted here – that the reassignment of its Safety Director to the workforce caused a failure to process documents from MSHA. Docket No. SE 2016-43. Hence, the operator’s failure to timely answer the instant Petition was not the result of a single, isolated breakdown, but part of a long-running issue with Jesse Creek’s internal procedures.

I conclude from Jesse Creek’s own submissions and the submissions made by the Secretary that this is not a matter of mere “inadvertence.” The operator created and condoned an unreliable internal processing system, and failed to take reasonable precautions in the course of reassigning its Safety Director. Jesse Creek is an above-average sized operator with a large mine and presumably has the resources to ensure that correspondence from the Secretary and the Commission is properly handled. It failed to do so over a substantial period of time. Therefore, I would deny its motion to reopen.

  
Robert F. Cohen Jr., Commissioner

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