# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 2 3 2014

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| | : | Docket No. WEVA 2014-1044 |
| v. | : | A.C. No. 46-01968-343269 |
| CONSOLIDATION COAL COMPANY | : | |

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

## ORDER

BY: Nakamura, Acting Chairman; Althen, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On June 17, 2014, the Commission received from Consolidation Coal Company ("Consolidation") a motion 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 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"); *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).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on February 19, 2014, and became a final order of the Commission on March 21, 2014. Consolidation asserts that the proposed assessment was not timely contested due to miscommunication resulting from a change in contest procedures, arising from a change in ownership. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Consolidation's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it 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. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Patrick K. Nakamura, Acting Chairman

William I. Althen, Commissioner

Commissioner Cohen, dissenting:

I dissent from my colleagues because I believe that the respondent has not established good cause to reopen the captioned proceeding.

The subject motion to reopen concerns a proposed assessment for civil penalties that was delivered to Blacksville No. 2 Mine more than two months after the mine was acquired by Murray Energy Company from Consolidation Coal Company. This is the second docket in which the Commission has received a motion to reopen from the respondent contending that its failure to file a contest form because of "miscommunications" resulting from the transfer in ownership of the mine constitutes good cause to reopen final orders. *See also Consolidation Coal Co.*, 36 FMSHRC _, slip op. at 2, No. WEVA 2014-786.

On December 5, 2013, Murray Energy Company acquired the Blacksville No. 2 mine. Mot. at 2. On April 8, 2014, the Commission received the first motion to reopen (in Docket No. WEVA 2014-786). In its motion, the respondent alleged that the acquisition of the mine resulted in the disruption of the practices for filing notices of contest. The respondent claimed that its failure to file a notice of contest to a proposed assessment received on January 2, 2014 resulted from inadvertence or mistake within the meaning of Rule 60(b)(1). Apparently officials at the Blacksville No. 2 mine, consistent with past practices under Consolidation Coal, forwarded the contest form to the Murray Energy corporate offices. However, Murray Energy officials failed to file the form because Murray Energy's customary practice is that officials at the individual mine file the contest form.

Respondent stated that it discovered the lapse, investigated other outstanding Consolidation Coal citations, and then implemented new procedures to ensure the timely filing of notices of contest. Mot. at 3 (Docket No. WEVA 2014-786). Notably, it represented that "[t]his is the only such incident of this type arising from the re-allocation of responsibilities associated with the acquisition of Blacksville No. 2 by Murray Energy. Murray Energy and Blacksville #2 have now implemented procedures to ensure that assessments are timely contested. " *Id.* I concluded that the respondent established good cause to reopen the citations. *Consolidation Coal Co.*, 36 FMSHRC _, slip op. at 2, No. WEVA 2014-786.

On June 17, 2014, the Commission received a second motion to reopen, which is the subject of the captioned proceeding. This motion relates to a proposed assessment received on February 19, 2014. Again the respondent contends that Murray Energy's acquisition of the Blacksville No. 2 Mine resulted in a failure to timely file a contest

form, and requests that the Commission reopen the resulting final orders. The motion fails to account for the respondent's past assurances that it investigated its system of processing contest forms and implemented procedures to ensure the timely submission of contests of proposed assessments. In its first motion to reopen, the respondent had acknowledged that it was notified of the delinquency by email on February 24, 2014, and received a delinquency notice from MSHA dated March 18, 2014. Mot. at 3 (Docket No. WEVA 2014-786). Since the proposed assessment in the present case did not become final until March 21, 2014, the respondent clearly had time to act to prevent the second delinquency.

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).

I accepted the respondent's proffers that the failure to file a contest form in Docket No. WEVA 2014-786 was the result of mistake or inadvertence, and relied on its representations that it investigated the incident, discovered that this failure was an isolated incident, and implemented new procedures.

However, it is now apparent that the respondent did not investigate with the requisite level of diligence. If it had performed due diligence it could have discovered the problem in time to file a timely contest of the proposed assessment in Docket No. WEVA 2014-1044. Certainly it could have discovered the problem and filed a prompt motion to reopen. Instead, the respondent sought reopening more than two months after it failed to discover the problem in its own internal investigation.

I find the respondent's contentions to be insufficient to establish good cause to reopen the final order.

Robert F. Cohen Jr., Commissioner

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