FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

DEC 30 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 2013-1078 A.C. No. 15-19199-325351-E24
AUSTIN POWDER COMPANY	:	

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

ORDER

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On September 25, 2013, the Commission received from Austin Powder Company ("Austin") 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 June 27, 2013, and became a final order of the Commission on July 29, 2013. Austin asserts that its safety specialist mistakenly waited

for further instructions from her supervisors and didn't forward the assessment to counsel. Austin has modified its handling procedures to avoid future errors. 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 Austin'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' decision because I believe that Austin Powder has not established good cause to reopen the subject civil penalty case.

As grounds to reopen the proceeding, Austin Powder states that a safety and compliance specialist did not forward the proposed assessment to its counsel for contest because she was awaiting direction from three Austin Powder management officials on whether to do so. Mot. at 1-2. The operator produced an affidavit from the safety specialist who surmised that each of the managers "assumed" that she had forwarded the assessment to counsel, when, in fact, she was waiting for their instructions. Mot. at Ex. 1, par. 6. Austin Powder did not provide affidavits or other evidence from the three management officials who did the assuming, and so the safety specialist's affidavit, at best, is based on hearsay.

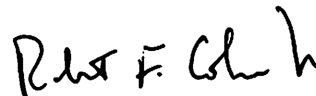
Austin Powder has an extensive history of filing motions to reopen. Its September 2013 motion was the sixth motion it has filed since 2006. *See Austin Powder Co.*, 34 FMSHRC 2346 (Sept. 2012) (covering two motions); 34 FMSHRC 1285 (June 2012); 28 FMSHRC 424 (July 2006); 28 FMSHRC 430 (July 2006). In its most recent prior motions to reopen, Austin Powder

moved the Commission to reopen two dockets under circumstances remarkably similar to the present case. In both of those cases the managers failed to instruct the safety specialist to forward the proposed assessments to its counsel. In granting the motions, the Commission noted that "[t]he operator further states that in the future its safety specialist will forward to counsel all proposed penalty assessments which the safety director intends to contest." 34 FMSHRC at 2347.

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). In examining the operator's asserted justifications for reopening a particular case, the Commission has also explored 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.

I find Austin Powder's claim of inadvertence or mistake to be insufficient, and that the operator has not established good cause to reopen the proceeding. The failure to file the contest in this case occurred only 10 months after the Commission reopened two other defaults for Austin Powder which were similarly caused by the failure of the three management officials to give direction to the safety specialist. Austin Powder did not make good on its promise to reform its system for contesting proposed assessments, and is asking us to reopen this case based on the same breakdown in communication that had recently occurred. I conclude that based on Austin Powder's own submissions, it has condoned an unreliable internal processing system and placed responsibility for its contest process on a lower-level employee rather than on its management officials. Austin Powder is a large operator which should have the resources to ensure that proposed assessments are timely contested. It has consistently failed to do so.

Therefore, I would deny its motion to reopen.



Robert F. Cohen, Jr., Commissioner

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