FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 08 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2014-532
v.	:	A.C. No. 46-09060-334458
TEN-MILE COAL COMPANY, INC.	:	

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

ORDER

BY: Jordan, Chairman; Young, Nakamura, 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 February 3, 2014, the Commission received from Ten-Mile Coal Company, Inc. ("Ten-Mile") 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 November 5, 2013, and became a final order of the Commission on December 5, 2013. Ten-Mile asserts that while the mine manager at the mine received the assessment, it became lost when the manager sent the assessment to the office of the Secretary and Treasurer of the company, which was located 60 miles away. The operator asserts that it has since changed it procedures by instructing the mine manager to scan and e-mail all future assessments to the Secretary and Treasurer's office. The Secretary does not oppose the request to reopen, however he urges Ten-Mile to take steps to ensure that future penalty contests are timely filed.

Having reviewed Ten-Mile'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.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

Commissioner Cohen, dissenting:

I dissent from my colleagues' decision because I believe that Ten-Mile has failed to demonstrate that its failure to timely contest the proposed assessment was the result of excusable neglect. My review of Ten-Mile's previous motions to reopen previous assessments, along with its current filing, demonstrates to me that the operator's failure to timely file was the result of an inadequate or unreliable internal processing system.

On September 26, 2011, the Commission granted Ten-Mile's request to reopen a civil penalty proceeding. *Ten-Mile Coal Co., Inc.*, 33 FMSHRC 2188 (Sept. 2011). Notably, in its motion to reopen, Ten-Mile stated prospectively that it would use a computer system to process civil penalty assessments. *Id.* at 2189-90.

On February 14, 2013, the Commission again granted a request from Ten-Mile to reopen a civil penalty case. *Ten-Mile Coal Co., Inc.*, 35 FMSHRC 356 (Feb. 2013). The operator asserted that its superintendent inadvertently mixed the proposed assessment with other paper work. The Commission granted the motion, but "urg[ed] Ten-Mile to take all steps necessary to ensure that future penalty contests are timely filed." *Id.* at 357.

This leads us to the filing currently before the Commission. On February 3, 2014, Ten-Mile filed a motion to reopen a civil penalty proceeding, asserting that the proposed assessment was lost after it arrived at the mine site. Mot. at 1. Ten-Mile once again assures the Commission that it will prospectively amend its procedures for contesting citations; specifically, once assessments arrive at the mine site Ten-Mile plans to scan the form and email it to the appropriate office.

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 behavior in other cases that is attributable to inadequate or unreliable internal processing systems. *See Oak Grove Res., LLC*, 33 FMSHRC 2378, 2379-80 (Oct. 2011).

While a single lost penalty assessment form may be the result of excusable neglect, this is the third time that Ten-Mile has come before the Commission and contended that it missed a filing deadline because of misplaced documents. In fact, Ten-Mile has previously recognized that its own filing system was inadequate and volunteered to use a computer system rather than paper copies. Moreover, less than a year before this current motion was filed, the Commission urged the operator to take all necessary steps to ensure timely filings.

For these reasons, I conclude that Ten-Mile has not demonstrated good cause to reopen the captioned matter and would deny its motion to reopen.

Robert F. Cohen, Jr., Commissioner

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