# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | Docket No. WEVA 2014-963 |
| v. | : | A.C. No. 46-01816-339181 |
| PINNACLE MINING COMPANY, LLC | : | |

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 May 20, 2014, the Commission received from Pinnacle Mining Company, LLC ("Pinnacle") 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 December 27, 2013, and became a final order of the Commission on January 27, 2014. Pinnacle asserts that it failed to timely contest the proposed assessment because its safety manager, who is responsible for handling proposed assessments, was on Christmas vacation when the proposed assessment was delivered. Another individual at the company signed for the proposed assessment but failed to give it to the safety manager, who was thus unaware of the proposed assessment. The Secretary opposes the request to reopen and notes that a delinquency notice was mailed to the operator on March 13, 2014.

In response, Pinnacle has submitted the affidavit of its safety manager who represents that Pinnacle has no record of having received the delinquency notice, and that Pinnacle was unaware of such delinquency until being notified by counsel in May 2014.[1]

Having reviewed Pinnacle'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

[1] The dissent notes that we have held that a failure to explain a delay in responding to a delinquency notice may be grounds for denial of a motion to reopen. *Slip op.* at 4, *citing Highland Mining Co.*, 31 FMSHRC 1313, 1317 (Nov. 2009). While this is true, Pinnacle has provided an explanation for its delay. Nothing in our decision today excuses an operator from acting promptly once it has discovered its failure to timely respond, or to explain any delay in acting later than 30 days from discovery of the delinquency.

Commissioner Cohen dissenting:

I dissent from my colleagues' decision and would deny Pinnacle's motion to reopen.

In its motion, Pinnacle argues that it failed to timely file the contest form due to mistake, inadvertence or excusable neglect. Pinnacle represents that customarily an employee of the operator picks up mail at the mine's Post Office Box and then distributes its contents to the appropriate employees. For instance, Pinnacle's past practice is for an MSHA proposed assessment to be delivered to the internal company mailbox of the mine's safety manager, David Meadows, after it is picked up from the Post Office Box. Mot. at 2.

However, in this instance, Mr. Toler, an employee from the human resources department, picked up the mail from the Post Office, signed for the proposed assessment, but neglected to deliver it to Mr. Meadows. Pinnacle represents that Mr. Meadows' absence on December 27, 2013 (the date Mr. Toler signed for the proposed assessment), somehow contributed to Mr. Toler's failure to deliver the assessment to the appropriate mailbox. Mot. at 2.

As a result of Pinnacle's failure to file the associated contest form, the proposed assessment became a final order on January 26, 2014.

Although Pinnacle submitted affidavits from Mr. Meadows, it did not submit an affidavit or other evidence from Mr. Toler, the person with actual knowledge. Hence, Pinnacle has not provided any information regarding what Mr. Toler actually did with the proposed assessment after he received it. This makes it difficult for the Commission to determine whether Pinnacle actually established excusable neglect in failing to timely contest the proposed assessment.

On March 13, 2014, MSHA notified the operator that it was delinquent in payment of the assessed civil penalties by a letter addressed to the mine's Post Office Box. Pinnacle represents that this letter also failed to reach the desk of Mr. Meadows. Included in Pinnacle's filings to the Commission is an affidavit from Mr. Meadows stating that he did not receive the letter. However, absent from its filings is an affidavit from any individual actually responsible for processing the mail.

The rule is well settled that proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed. *Maggio v. Wisconsin Ave Psychiatric Center, Inc.*, 987 F.Supp.2d 38, 41 (D.C. Cir. 2013) (citing *Hagner v. United States*, 285 U.S. 427, 430 (1932), *Rosenthal v. Walker*, 111 U.S. 185 (1884)). I conclude that Pinnacle failed to rebut the presumption that the delinquency letter was delivered.

The Commission has repeatedly held that when 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. *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 conclude that the facts demonstrate that Pinnacle continues to exhibit an inadequate or unreliable internal processing system. In this case, Pinnacle failed to timely respond to either the proposed assessment or the delinquency letter. *See Highland Mining Co.*, 31 FMSHRC 1313, 1317 (Nov. 2009) ("Motions to reopen filed more than 30 days after receipt of such information from MSHA should include an explanation for why the operator waited so long to file for reopening. The lack of such an explanation is grounds for the Commission to deny the motion."). The motion to reopen was filed more than two months after receipt of the delinquency letter.

I dissent from my colleagues' decision. A closer examination of the operator's representations demonstrates that Pinnacle has failed to establish grounds warranting reopening.

Robert F. Cohen, Jr., Commissioner

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