

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

JUN 07 2016

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

v.

TUNNEL RIDGE, LLC

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Docket No. WEVA 2014-962
A.C. No. 46-08864-345488

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 21, 2014, the Commission received from Tunnel Ridge, LLC (“Tunnel Ridge”) 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 March 19, 2014, and became a final order

of the Commission on April 18, 2014. Tunnel Ridge asserts that it failed to timely contest the proposed assessment because it currently has only a part time safety director. Tunnel Ridge says that it will hire a full-time safety director in the near future to ensure that future penalty assessments are timely contested. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Tunnel Ridge'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 to reopen this proceeding, and conclude that Tunnel Ridge has not established good cause for its failure to timely respond. The crux of the operator's motion is that it failed to timely file because it did not have a full-time Safety Director on staff. I conclude that a large coal mine's failure to timely file a notice of contest is not excused because the mine lacks a full-time Safety Director.

In its motion to reopen, Tunnel Ridge represents that beginning in January 2014, it began to phase out the Safety Director's responsibilities while it searched for a new Safety Director. Thus, its Safety Director worked in this capacity only on a part-time basis. MSHA's proposed assessment was received on March 19, 2014. The part-time Safety Director did not discover that the proposed assessment had gone uncontested until May 5, 2014, and attempted to file a contest of some of the proposed penalties then. After MSHA rejected the attempted contest as untimely, the motion to reopen was filed on May 20, 2014. Tunnel Ridge states that at the time it filed the motion with the Commission it was still seeking to hire a full-time Safety Director. Mot. at 2. Apparently, the mine had lacked a full-time Safety Director for a period that stretched for almost five months.

Tunnel Ridge operates a large coal mine. At the time the citations were issued, the mine produced over two million tons of coal annually, and its controlling entity produced over ten million tons of coal annually.¹

Tunnel Ridge's decision to phase out the responsibilities of its Safety Director before a new Safety Director was hired was a self-imposed problem that does not justify relief pursuant to Rule 60(b). The prolonged absence of a full-time Safety Director at a large coal mine demonstrates a complacency toward the operator's responsibilities under the Mine Act that should neither be condoned nor deemed "excusable neglect" by the Commission.



Robert F. Cohen, Jr., Commissioner

¹ The Proposed Assessment reflects that MSHA assigned the mine 15 out of 15 "Mine Points" and 10 out of 10 "Controller Points." Proposed Assessment Case No. 000345488; *see also* 30 C.F.R. § 100.3.

Distribution

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