FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

SEP 10 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2014-174
v.	:	A.C. No. 36-05466-337811
EMERALD COAL RESOURCES, LP	:	

BEFORE: Nakamura; Cohen and Althen, Commissioners[1]

ORDER

BY: 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 March 12, 2014, the Commission received from Emerald Coal Resources, LP ("Emerald") 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

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[1] Chairman Mary Lu Jordan and Commissioner Michael G. Young assumed office after this case had been considered by the other Commissioners. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 (June 1994). In the interest of efficient decision making, Chairman Jordan and Commissioner Young have elected not to participate in this matter.

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 10, 2013, and became a final order of the Commission on January 9, 2014. Emerald asserts that it failed to timely contest the proposed assessment because its safety director was on leave from his duties from October 18, 2013 to February 17, 2014 to address a serious medical issue. 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 Emerald'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, Commissioner

William I. Althen, Commissioner

Commissioner Cohen, dissenting:

I dissent from my colleagues' decision because I conclude that Emerald Coal Resources has not demonstrated good cause to reopen the subject civil penalty proceeding.

On December 10, 2013, the Proposed Assessment form at issue was delivered to Emerald Mine. At this time, the mine's safety director was on an extended medical leave.[2] Emerald did not file a timely contest to the proposed assessment.

On February 24, 2014, after the safety director had returned to work, the mine received a letter from MSHA stating that Emerald was delinquent in the payment of penalties associated with the subject assessment. Thereafter, the safety director contacted counsel, who filed the motion to reopen on March 12, 2014. The operator submits that its failure to timely contest the form, during the time when its safety director was on leave, is the result of inadvertence or mistake within the meaning of Rule 60(b) of the Federal Rules of Civil Procedure.

The operator's contention that its failure to timely file the form was the result of some form of excusable neglect is not substantiated. The prolonged absence of a safety director at a large coal mine is not, in and of itself, good cause to permit the reopening of a civil penalty proceeding. *See* Ex. A.[3] Presumably, during the safety director's lengthy absence from work Emerald made arrangements for his duties and responsibilities to be handled by someone else.

The operator's motion provides no details regarding how the safety director's responsibilities were handled in his absence, and, in particular, does not describe if the mine had established any procedures for contesting MSHA's proposed civil penalties or citations in his absence. Furthermore, the motion does not provide relevant information regarding who at the mine received the proposed assessment on December 10 and what was done with it. Therefore, it is not possible to determine whether this failure to timely file was the result of excusable neglect on the part of an otherwise diligent operator, or whether it was symptomatic of a general indifference to MSHA deadlines during the relevant four month period.

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[2] The safety director was on medical leave from October 18, 2013 to February 17, 2014.

[3] The Proposed Assessment for the citations at issue represents that Emerald Mine received the maximum number of "mine points" and "controller points" when MSHA's assessment office considered the "size of the operator" pursuant to the Secretary's Part 100 penalty regulations. *See* 30 C.F.R. § 100.3.

A mine of Emerald's size surely must have had a safety department that continued to operate in the four-month absence of its director, yet the motion contains no affidavit from anyone other than the absent safety director, certifying that he was indeed absent. While his medical condition is deserving of sympathy, it does not relieve Emerald of its responsibility to comply with MSHA procedures.

For the aforementioned reasons, I conclude that Emerald has not established good cause for its failure to timely file, and, therefore, I do not vote to grant reopening of the civil penalty proceeding. *See Coal Prep. Servs.*, Inc., 17 FMSHRC 1529, 1530 (Sept. 1995).[4]

Robert F. Cohen, Jr., Commissioner

[4] As points of contrast, compare the Commission's holdings in *Tata Chemicals Partners*, 37 FMSHRC 523 (Mar. 2014) and *Tata Chemicals Partners*, 37 FMSHRC 525 (Mar. 2014). In these proceedings, the Commission concluded that an operator demonstrated good cause to reopen proposed assessments which were delivered to a mine, and not timely contested during a period when the party normally responsible for MSHA filings was on medical leave. The motions to reopen were accompanied by an affidavit from an employee, newly tasked with the responsibilities, which explained in some detail why he inadvertently failed to properly contest the proposed assessments.

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