FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 30, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2010-1496
v.	:	A.C. No. 15-18861-221400
CONSHOR MINING LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 23, 2010, the Commission received from Conshor Mining LLC ("Conshor") a request seeking to reopen a penalty assessment that has become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On September 23, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

In the case before us, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment for case No. 000221400 on June 3, 2010. In its motion to reopen, Conshor states that it had intended to contest ten of the citations listed in the proposed assessment, but failed to do so within 30 days of service because it had ceased active mining operations. The proposed assessment therefore became a final order of the Commission, pursuant to section 105(a) of the Mine Act, on July 18, 2010. Conshor submitted its notice of contest to MSHA two weeks late, on August 2, 2010.

The Secretary does not oppose Conshor's motion to reopen, "in light of the explanation offered in support of the motion." Sec'y Resp. However, the Secretary urges the operator to take all steps necessary to ensure timely responses in the future and further notes that Conshor is delinquent in payment of $115,134 in penalties, including the $48,220 at issue in this case. The Secretary states that she will take into account the failure to address these delinquencies in deciding whether to oppose future motions to reopen.

Conshor asserts that it failed to timely contest the penalties at issue because it had ceased active mining operations. The operator discovered the error and submitted the notice of contest for ten citations two weeks late.[1] The Secretary expressly cited the operator's explanation as grounds for not opposing the motion to reopen. While the Secretary noted that the considerable penalties due in this case are part of a total delinquency of more than $115,000 owed by the operator, she decided to afford the operator an opportunity to contest the citations at issue and to defer the delinquency issue.[2]

[1] This case is clearly distinguishable from *Elk Run*, cited by our dissenting colleague. In that case, the mine's mail was allowed to accumulate over a period of three months. *Elk Run Coal Co.*, 32 FMSHRC 1587, 1588 (Apr. 2009). There the assessment was issued in April 2009, and we did not receive the motion to reopen until July 28, 2009. *Id.* A cessation of active mining operations is not an ordinary circumstance. In *Elk Run*, however, the failure to make any provision for receiving and responding to mail for several months was not explained, and due to the duration, was not excusable as a mere oversight. By contrast, the operator here must have made some effort to address the issue of mail delivered to the idled mine, on its own, within a brief period of time. This is, therefore, not a similar case of patent neglect.

[2] Contrary to our dissenting colleague, we decline to address the issue of whether the operator's delinquent penalties amount to bad faith.

Having reviewed the facts and circumstances of this case, Conshor's request, and the Secretary's response, we agree with the Secretary's tacit acknowledgment of the operator's reasonable excuse under the circumstances and 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.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Patrick K. Nakamura, Commissioner

Commissioner Cohen, dissenting:

I cannot agree with my colleagues' determination that the motion filed by Conshor Mining LLC is sufficient to reopen a penalty assessment that has become final under section 105(a) of the Mine Act. The only information provided in the motion is that at the time of the proposed assessment "Conshor had already ceased active mining operations."

The Commission has made it clear that when a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established inadvertence, mistake or excusable neglect so as to justify reopening a final assessment. *Pinnacle Mining Co*., 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co*., 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co*., 32 FMSHRC 1155, 1156 (Sept. 2010); *see Gibbs v. Air Canada*, 810 F.2d 1529, 1537-38 (11th Cir. 1987). In particular, in *Elk Run Coal Co.,* 32 FMSHRC 1587-1589 (Dec. 2010), the Commission recently held that failure to open and deal with incoming mail when the mine was idled does not constitute inadvertence or excusable neglect.

Nor does the closure or movement of a plant office justify failure to respond to a proposed assessment. *Harvey Trucking Inc*., 32 FMSHRC 1245 (Oct. 2010) (holding that operator's argument that it did not receive the proposed assessment because its office was closed due to illness was not a sufficiently detailed explanation for its failure to contest the proposed penalty assessment.); *B&W Res., Inc.*, 32 FMSHRC 1627 (Dec. 2010) (holding that operator's argument that it moved its office and hired new personnel is insufficient to establish grounds for reopening the assessment).

In the motion to reopen the penalty assessment, Conshor's counsel stated only that it "had already ceased active mining operations." It appears that Conshor's internal procedure was insufficient to timely respond to a penalty assessment. Conshor fails to explain how and why ceasing "active mining operations" affected the normal processing of penalty assessments. It does not explain how penalty assessments were processed after the mine "ceased active mining" and whether and in what form the office procedures continued. If Conshor had simply walked away from its responsibilities after ceasing active mining operations, it would certainly not be entitled to reopening of the penalty assessment.[1]

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[1] Conshor also failed to respond to the Secretary's assertion that it is currently delinquent with respect to approximately $115,134 in penalties. In *B & W,* 32 FMSHRC at 1628, the Commission denied a reopening motion without prejudice, *inter alia,* because the operator had not responded to the Secretary's assertion of delinquent penalties at this mine in the amount of $95,984. The Commission has recognized in a case involving a request for relief from a final Commission decision that "[t]he absence of bad faith on the part of the defaulting party is also a relevant concern." *M.M. Sundt Constr. Co.,* 8 FMSHRC 1269, 1271 (Sept. 1986). In the present case, the existence of approximately $115,134 in delinquent penalties may show bad faith on the part of the operator.

In the absence of any explanation beyond the cessation of active mining operations, I conclude that Conshor has failed to carry its burden of justifying reopening.

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Robert F. Cohen, Jr., Commissioner

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