FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 23, 2011

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
	:	Docket No. LAKE 2011-146-M
v.	:	A.C. No. 33-00087-224601
STONECO INC.	:	

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

ORDER

BY: Duffy, Young, Cohen, and Nakamura, Commissioners:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 9, 2010, the Commission received a request to reopen a penalty assessment issued to Stoneco Inc. ("Stoneco") that became 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 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).

On June 30, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000224601 to Stoneco for two citations issued to the operator on May 4, 2010. Stoneco states that on May 13, 2010, it sent a fax to MSHA's office in Duluth, Minnesota requesting a conference regarding one of the citations. It further states that it simply overlooked the fact that it had to send the Proposed Assessment form to MSHA's office in Arlington, Virginia, in order to contest the assessment.

The Secretary opposes Stoneco's request, arguing that the operator's statement is conclusory and insufficient to justify reopening. The Secretary further states that an MSHA Conference and Litigation Representative notified the operator by letter dated May 13, 2010, that a conference would not be scheduled until after the operator received and contested the proposed assessment and that failure to timely contest would result in cancellation of its conference request. In addition, MSHA records show that the proposed assessment was delivered to Stoneco via Federal Express on July 9, 2010.

Having reviewed the operator's request to reopen and the Secretary's response thereto, we agree that Stoneco has failed to provide a sufficient basis for the Commission to reopen the penalty assessment. Accordingly, we hereby deny without prejudice Stoneco's request to reopen. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that Stoneco may submit another request to reopen

Assessment No. 000224601.[1] Any amended or renewed request by the operator to reopen this assessment must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

[1] If Stoneco submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Stoneco should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. Stoneco should also submit copies of supporting documents with its request to reopen and specify which proposed penalties it is contesting. In addition, Stoneco should indicate when it first became aware that it had missed the contest deadline and whether it acted promptly in filing its motion to reopen.

Chairman Jordan, dissenting:

Stoneco failed to timely contest the penalties at issue in this case. It now asks the Commission to reopen these proceedings on the grounds that it "overlooked the fact" that it was required to send a contest notice to the MSHA office in Arlington, Virginia. However, it received clear notice of this requirement, not once, but two times before the deadline to file a contest.

Not only did the proposed assessment itself advise Stoneco of its duty to contest the assessment within thirty days, but in addition, MSHA's Conference Litigation Representative notified the operator in a May 13, 2010 letter that in order to contest the penalties, the assessment form would need to be returned to the address shown on the form. This letter also made clear that a conference would only be scheduled after the penalties had been contested, and that the operator's request for a conference did not alter the requirement for filing a penalty contest.

Having reviewed Stoneco's motion and the Secretary's response, I would deny the operator's request with prejudice. The Secretary provided clear instructions two times to Stoneco regarding the necessity of filing a timely penalty contest. Consequently, this is not a situation in which the operator should be provided with another opportunity to expand on its failure to contest the penalty. *See Extra Energy, Inc.*, 31 FMSHRC 377, 379-80 (Apr. 2009) (opinion of Commissioners Jordan and Cohen) (denying the request to reopen when the operator's sole excuse for not filing timely notices of contest was that its representative was instructed to file the contests and failed to do so because a telephone call was not returned); *Left Fork Mining Co., Inc.*, 31 FMSHRC 8, 10 (Jan. 2009) (denying the request to reopen because the operator's conclusory statement that its failure to timely file was due to inadvertence or mistake did not provide an adequate basis to justify reopening).

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Mary Lu Jordan, Chairman

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