

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

April 08, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2013-350
v.	:	A.C. No. 44-06685-299480
	:	
BANNER BLUE COAL COMPANY	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, 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. (2012) (“Mine Act”). On May 14, 2013, the Commission received from Banner Blue Coal Company (“Banner Blue”) 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).

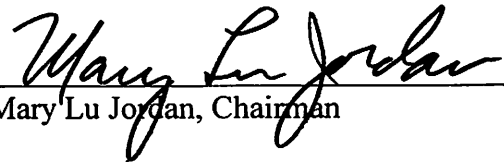
Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on September 6, 2012, and became a final order of the Commission on October 8, 2012. Banner Blue asserts that its safety director instructed its administrative assistant to file the contest form, but the assistant mistakenly failed to file it timely. Banner Blue states that it discovered the delinquency on MSHA's data retrieval system on May 8, 2013. The Secretary does not oppose the request to reopen based solely on the fact that MSHA received a late contest and a payment for the uncontested penalties dated October 12, 2012. However, the Secretary notes that MSHA mailed a late notice on November 1, 2012, and a delinquency notice on November 21, 2012, but the operator did not file this motion until May 2013.

The Commission has made it clear that where 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). In this case, we conclude that sufficient evidence has been presented to suggest that the lack of any procedure to confirm that the required paperwork was timely filed represents an inadequate or unreliable internal processing system.

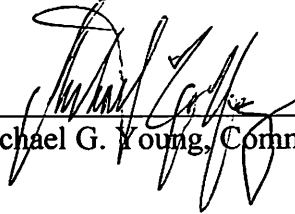
Banner Blue has not replied to the Secretary's response to its motion. In particular, the operator failed to explain why it took six months after receiving the late and delinquency notices to request reopening. We encourage parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary's response. *See, e.g., Climax Molybdenum Co.*, 30 FMSHRC 439, 440 n.1 (June 2008); *Highland Mining Co.*, 31 FMSHRC at 1316 n.3.

In considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC at 1316-17 (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion). Here, the unexplained delay in responding to MSHA's delinquency notice amounted to six months. Banner Blue's statement that it discovered the delinquency on MSHA's data retrieval system on May 8, 2013, does not explain how and why it ignored MSHA's late and delinquency notices in November 2012. Banner Blue has not provided an explanation for filing its motion to reopen more than 30 days after receiving the delinquency notice.

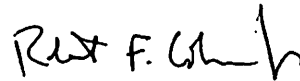
Having reviewed Banner Blue's request and the Secretary's response, we conclude that Banner Blue has failed to establish good cause for reopening the proposed penalty assessment. Accordingly, we hereby deny without prejudice Banner Blue's request to reopen. *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). Should Banner Blue choose to renew its motion, it should provide an explanation for filing its motion to reopen more than 30 days after receiving the delinquency notice. Any renewed request by the operator to reopen this assessment must be filed within 20 days of this order. Any such request filed after that time will be denied with prejudice.



Mary Lu Jordan, Chairman



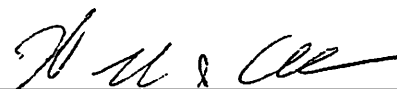
Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner



William I. Althen, Commissioner

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