FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 3, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. VA 2009-3
ADMINISTRATION (MSHA)	:	A.C. No. 44-03317-153866
	:	
v.	:	Docket No. VA 2009-4
	:	A.C. No. 44-06685-153869
BANNER BLUE COAL COMPANY	:	

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

ORDER

BY: Jordan, Chairman; Duffy and Young, 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 October 3, 2008, the Commission received from Banner Blue Coal Company ("Banner Blue") requests to reopen two penalty assessment that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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).

On June 17, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued two separate proposed penalty assessments to Banner Blue. Banner Blue, however, did not file notices of contest with MSHA until August 22, 2008. Banner states that one reason for the late filing of its contests was the placement, in error, of an internal date stamp of "July 25, 2008," on each of the proposed assessments by Kristy Hurley, a secretary with Banner Blue's parent company, although the assessments were actually received a month earlier. Banner Blue also contends that MSHA's change in delivery methods from the use of certified

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers VA 2009-3 and VA 2009-4, each captioned *Banner Blue Coal Co.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

mail to the use of Federal Express delivery had disrupted its internal processing system for proposed assessments.[2]

The Secretary opposes reopening on the ground that the parent company's safety director – who ultimately reviewed the assessments and directed the company's counsel to contest certain of the penalties in each assessment – should have noticed the June 17, 2008, issuance date on the assessments, investigated the discrepancy with the internal date stamp, and discovered that the assessments had actually been received on June 24. The Secretary also points out that MSHA had changed its delivery methods approximately nine months before Banner Blue received the proposed assessments.

We have held 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 inadvertence or mistake. *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).

[2] Banner claims that this change resulted in assessments going first to its president's secretary rather than directly to Ms. Hurley in the Engineering Department. However, documents submitted by the Secretary indicate that Ms. Hurley signed for the Federal Express deliveries of the assessments at issue here.

Having reviewed Banner Blue's requests and the Secretary's response, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether the alleged erroneous date-stamping of the assessments constitutes good cause for Banner Blue's failure to timely contest the penalty proposals and whether relief from the final orders should be granted.[3] If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

[3] In our opinion, a judge would be in a better position to consider those facts raised by the Secretary and our dissenting colleague, Commissioner Cohen, that cast doubt whether Banner Blue's failures to timely file notices of contest can be attributed to the erroneous date-stamping.

Commissioner Cohen, dissenting:

This case involves two penalty assessments – 16 enforcement actions with penalties totaling $44,629.00. My colleagues would remand the case to the Chief Administrative Law Judge for a determination of whether good cause exists for Banner Blue's failure to timely contest the penalty proposals. I respectfully dissent because the facts offered by Banner Blue in its motions fall far short of demonstrating good cause for reopening, especially in light of the criteria of mistake, inadvertence, surprise, or excusable neglect contained in Rule 60(b) of the Federal Rules of Civil Procedure.

Banner Blue is controlled by Wellmore Coal Company ("Wellmore"). Mot. at 2. According to the motions, Wellmore has a central mine management office which handles the operations of 24 mines. *Id*. According to the motions, Wellmore receives "foot high stacks of mail that [come] in each day for all of Wellmore's 24 mining operations." *Id.* According to the motions, Wellmore employs one secretary who is "without ample storage" to handle this volume of mail. Mot. at 5.

The record shows that the two proposed assessments, both dated June 17, 2008, were received by Wellmore on June 24, 2008.[1] However, the assessments bear a "Wellmore Coal Company - Engineering Department" date stamp of July 25, 2008. According to the motions, Banner Blue's counsel "processed" the assessments on August 22, 2008. Mot. at 1. After MSHA notified Banner Blue's counsel that the contests of the assessments were not filed timely, counsel submitted these motions to the Commission on September 30, 2008.

Banner Blue advances three possible explanations for its failure to timely contest the penalty assessments at issue. Its first explanation is that MSHA changed its delivery method from certified mail to Federal Express. According to the motions, "MSHA's change in the mailing procedure of MSHA 1000-179 forms from certified mail to Federal Express foiled a well-laid procedure for processing the forms, and certainly either caused or at least exacerbated other potential mistakes." Mot. at 5-6. MSHA had sent a notice to operators explaining the new mailing procedure, and stating that it would go into effect on September 17, 2007. S. Opp. at 3 n.3. The proposed assessments in this case were received by Wellmore on June 24, 2008, over nine months after this change. A company with the resources and skill to administer 24 separate mining operations presumably has the ability, within nine months, to adjust its internal procedures to accommodate MSHA's change in mailing methods.

The second explanation provided by the operator is that because of the change in MSHA's delivery system, the assessments did not go to Wellmore's Engineering Department secretary, as previously, but instead were sent to the President's secretary, who would forward them to the Engineering Department secretary. Because the President's secretary "did not realize

[1] This fact was not indicated by Banner Blue in its motions. The Commission was furnished evidence of the actual delivery date of the assessments by the Secretary in her response.

the urgency of the mailing," the operator claims that she did not open them immediately. Mot. at 2. Then, according to Banner Blue, when the Engineering Department secretary received the assessments from the president's office and date-stamped them, she would have stamped the forms as received on the day they came across her desk. *Id*.

Banner Blue's essential problem with this explanation is that the record shows that it did not happen. The Secretary provided the Commission with Federal Express delivery records showing that the two assessments issued on June 17, 2008 were signed for by "K. Hurley" on June 24, 2008. The operator's motions contain affidavits from Kristy Hurley, who identifies herself as the secretary for the Engineering Department. Thus, one must conclude that these assessments never went to the President's secretary, but instead went to the Engineering Department secretary who normally processed the assessment form.

Banner Blue's third explanation is that the Engineering Department secretary had recently obtained a new date stamp and may have incorrectly stamped July 25 on the assessments. *Id*. at 3, 5. However, Ms. Hurley's affidavit states that she obtained the new date stamp "in early June of 2008." Hurley Aff. at 2. It is unclear whether the operator is asserting that she was date-stamping July instead of June on the "foot-high stacks of mail that came in each day" for approximately two weeks and that no one noticed, or whether she was date-stamping the mail accurately for those two weeks and only these assessments were stamped July 25 instead of June 24.

Another reason why the third explanation is not acceptable is that, as the Secretary points out, it is not an excuse for the Safety Director, Robert Litton, to rely on the date stamp on the assessment forms when the forms themselves clearly indicated the date of issuance as June 17, 2008. A prudent safety director who routinely processed numerous assessments would look at the date of the assessment and – if it was markedly different from the date stamp (i.e., 38 days) – make some inquiries. I note that on all the assessments someone has written instructions within an inch of the printed date of June 17, 2008.

In its motions, the operator acknowledges that it had "a systemic problem in the entire MSHA [penalty assessment form] processing system at the mine office." Mot. at 1. As noted above, Wellmore was responsible for the operation of 24 mines, with a central mine management office that processed "foot high stacks of mail that came in each day" for all of these operations. Mot. at 2. The single secretary who was charged with processing this mail "without ample storage" was also responsible for managing the "forms, plans, and files for the 24 mines controlled by the Wellmore division." Hurley Aff. at 1. In other words, this case is not about an operator for whom MSHA's change in the mailing of the assessment forms to Federal Express nine months earlier "foiled a well-laid procedure." Mot. at 5-6. It is not about the President's secretary who "did not realize the urgency of the mailing." *Id*. at 2. It is not even about the Engineering Department secretary having a wrong date on her stamp. It certainly is not "a series of problems outside of any one person's control." *Id*. at 5. What this case involves is a company which has one person processing a foot-high stack of mail, affecting 24 separate operations,

every day, in addition to her other responsibilities. This is not mistake or inadvertence. It is about a large operator (or at least a large controller) which set up a system that, at some point, was bound to fail.

The Commission has previously emphasized that "[r]elief under Rule 60(b) should generally not be accorded to an operator who creates and condones a system which predictably will result in missed deadlines." *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008). In the *Pinnacle* cases, we denied relief from final orders when the operator "failed to create a mechanism to ensure that it would routinely and effectively receive mail when it was delivered." 30 FMSHRC at 1062; 30 FMSHRC at 1067.

Moreover, the federal courts have recognized, pursuant to Rule 60(b)(1) that "where internal procedural safeguards are missing, a defendant does not have a 'good reason' for failing to respond to a complaint." *Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 935-36 (11th Cir. 2007) (collecting cases); *see* 11 Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2858 n.22 (3d ed.). As the 11th Circuit has noted, "[d]efault that is caused by the movant's failure to establish minimum procedural safeguards for determining that action in respond to a [complaint] is being taken does not constitute default through excusable neglect." *Gibbs v. Air Canada*, 810 F.2d 1529, 1537 (11th Cir. 1987); *National Railroad Passenger Corp. v. Patco Transport, Inc.*, 128 Fed. Appx. 93, 95 (11th Cir. 2005) (citation omitted). Similarly, the 7th Circuit has held that where a party's "internal procedures simply broke down", the party's failure to answer a complaint was not excusable under Rule 60(b)(1). *North Cent. Ill. Laborers' Dist. Council v. S.J. Groves & Sons Co.,* 842 F. 2d 164, 166-67 (7th Cir. 1988) (default not excusable where corporation's in-house counsel staff of two attorneys was reduced to one because other attorney was disabled, and remaining attorney overlooked the complaint in the resulting pressure, confusion, and increased workload).

An excellent analysis of the issue was set forth by Judge Haynsworth, concurring in *Park Corp. v. Lexington Insurance Co.,* 812 F.2d 894 (4th Cir. 1987). In this case, the court held that the unexplained disappearance of the summons and complaint from the defendant's mail room did not constitute grounds for relief from the default judgment under Rule 60(b)(1). Judge Haynsworth wrote a separate concurring opinion because he thought that the majority's standard was too stringent. The Judge focused on the issue of whether a party "maintains adequate internal controls designed to capture and record incoming legal papers and to get them to the responsible official for an appropriate response," and stated that where such adequate internal controls exist, "a district court should not deny Rule 60(b) relief simply because the party cannot explain how the particular papers were lost." *Id.* at 898. Nevertheless, Judge Haynsworth concurred with the majority because "Lexington offered no evidence of procedures in the mail room by which the person signing the receipt for the registered or certified mail insures that the papers received in the mail room are recorded on the log and transmitted to the appropriate legal or claims department." *Id.* He concluded: "The best of systems sometimes suffers an occasional

breakdown. When it does, the neglect should be treated as excusable, but sloppy handling of papers by which legal actions are commenced is inexcusable." *Id.*

This case does not need to be remanded to a judge for a determination as to whether relief should be granted. The operator's submissions reveal, as it admits, a "systemic problem." Mot. at 1. However, it is not, as the operator contends, "a series of problems outside of any one person's control." Mot. at 5. Rather, it is a poorly-constructed, inadequately-staffed and apparently unsupervised system which was, sooner or later, bound to fail. That does not constitute "inadvertence," "mistake," or "excusable neglect," and does not constitute a showing of good cause for the operator's failure to timely respond to the penalty assessments. Consequently, I would deny the motions.

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Robert F. Cohen, Jr., Commissioner

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