FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

October 30, 2009

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2009-314
v.	:	A.C. No. 44-04856-162333
CONSOLIDATION COAL COMPANY	:	

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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 June 8, 2009, the Commission received a motion by counsel for Consolidation Coal Company ("Consol") 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).

On September 10, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000162333 to Consol, proposing civil penalties for 107 citations issued to the operator at its Buchanan Mine over the course of the preceding three months. Consol states that MSHA's records show that Consol received the package containing the assessment, but that the operator otherwise has no record of what happened to the assessment after that. Consol explains that the individual to whom the form was addressed, and to whom it would have been forwarded after its receipt, stopped working at the mine in November 2008. Consol further notes that the individual who was ultimately responsible for processing assessments at the time in question has no record or recollection of receiving the form.

The Secretary opposes Consol's request to reopen the proposed assessment. She argues that Consol's inadequate or unreliable internal distribution procedures do not constitute the exceptional circumstances required for reopening. The Secretary also states that the penalty assessment became a final Commission order on October 17, 2008, and that on December 10, 2008, MSHA sent a delinquency notice to Consol informing the operator that it had failed to timely contest the proposed penalties. The Secretary asserts that Consol has failed to explain why it did not file its motion for reopening until nearly an additional six months had passed.

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 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).

We do not agree with the Secretary that this one instance necessarily establishes that Consol's internal distribution procedures are inadequate or unreliable. However, in considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, 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). Although the Secretary's response raised the issue that Consol failed to explain why, after it was informed of the delinquency, it took as long as it did to request reopening, the operator did not file a reply providing an explanation.[1]

[1] 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). Accordingly, where the Secretary raises the issue of the delay between receipt of a delinquency letter and the filing of the request to reopen, an operator who does not explain why, after it was informed of a delinquency, it took as long as it did to request reopening, does so at its peril.

Having reviewed Consol's request and the Secretary's response, we conclude that Consol has failed to explain the delay in responding to the delinquency notice and therefore has not provided the Commission with an adequate basis to reopen. *See, e.g., Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). Accordingly, we deny without prejudice Consol's request to reopen.

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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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Robert F. Cohen, Jr., Commissioner

Distribution:

R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateway Center, Suite 1340
401 Liberty Avenue
Pittsburgh, PA 15222

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021