FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 9, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2011-160-M
v.	:	A.C. No. 10-00082-228212
U.S. SILVER – IDAHO, INC.	:	

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

ORDER

BY: Duffy, Young, 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 October 29, 2010, the Commission received a motion from counsel for U.S. Silver – Idaho, Inc. ("U.S. Silver"), requesting that the Commission 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 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).

U.S. Silver requests reopening of Proposed Assessment No. 000228212, issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") on August 11, 2010. Its safety manager states, by affidavit, without further explanation, that because the operator was paying most of the penalties proposed by the assessment, "an administrative error was somehow made and the marked proposed assessment was sent to MSHA late."

The Secretary does not oppose reopening, and reports that U.S. Silver made a partial payment on the assessment with a check dated October 7, 2010. She includes a copy of the completed contest form that appears to have been received by MSHA on October 4, 2010, and which shows that U.S. Silver intended to contest the three penalties it now seeks to reopen.

We also note that the operator had timely contested the three underlying orders when they were issued and that those contests are currently stayed before the Commission. Consequently, we 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.[1]

_____
Michael F. Duffy, Commissioner

_____
Michael G. Young, Commissioner

_____
Patrick K. Nakamura, Commissioner

[1] Our colleagues would deny the motion to reopen on the basis that in a 2009 motion to reopen, the operator stated it was implementing a plan to prevent failures to respond in a timely manner to penalty assessments, and its present motion does not explain how that new system failed in this instance. Given that the Secretary does not object to reopening, and this motion to reopen has been the only one received from the operator in the intervening two years, we are not persuaded that denying the motion and requiring further explanation from the operator in a renewed motion is necessary. Moreover, if U.S. Silver had a history of delinquencies, we believe the Secretary would have called that to our attention, as she recently did with respect to the operator in Docket No. SE 2011-16, *Oak Grove Resources, LLC*.

Chairman Jordan and Commissioner Cohen, dissenting:

U.S. Silver – Idaho, Inc., received a proposed penalty assessment on August 18, 2010. To timely contest the penalties, it was required to send a form to the Mine Safety and Health Administration ("MSHA") within 30 days of receipt. However, it appears that the contest form was not received by MSHA until October 4, 2010. The only explanation offered by the operator in its request to reopen is that because it paid most of the penalties proposed in the assessment "an administrative error was somehow made."

At the outset, we note that MSHA's penalty contest form (attached to the submission of the Secretary of Labor in this case) is expressly designed for just the type of situation the operator faced in this case – the payment of some of the proposed penalties shown on the assessment form, and the contest of others. The front of the form explicitly states that "[i]f you wish to contest and have a formal hearing *on just some of the violations listed in the Proposed Assessment*, check the specific violation numbers in the first column and mail a copy" to MSHA (emphasis added). Despite these clear instructions, the operator did not comply. Its terse explanation does not tell us what type of "administrative error" led to the late filing, and this makes it difficult for us to ascertain whether its actions constituted "mistake, inadvertence, or excusable neglect," pursuant to Rule 60(b)(1) of the Federal Rules of Civil Procedure.

This explanation is also insufficient in light of a recent Commission case involving a request to reopen a final order from this same operator. In *U.S. Silver-Idaho, Inc.*, 31 FMSHRC 1127 (Oct. 2009), the operator was also late in submitting a notice of contest to a proposed assessment. In our order granting relief we stated that the affidavit of U.S. Silver's safety superintendent "notes that the company has now revised its procedure to more accurately calendar assessments in an effort to avoid the same circumstance in the future." *Id*. at 1128. This new procedure placed "deadlines to contest all MSHA assessments, detailed by mine name and case number, on both the paper and electronic calendars of both the safety superintendent and the administrative assistant." *Id*. at 1128 n.2.

This change in procedure would have occurred in 2009 (when our order issued). The relevant time period in the case before us now was 2010. The operator's motion does not explain why this new system failed to ensure the filing of a timely penalty contest.

For the reasons set forth above, we would deny the request to reopen without prejudice to require the operator to explain in further detail the nature of the "administrative error" blamed for the missed deadline, and to explain why the change in procedures described in our earlier order was not sufficient to prevent the late filing of the contest of the proposed penalty.

_____

Mary Lu Jordan, Chairman

`

_____

Robert F. Cohen, Jr., Commissioner

Distribution:

Mark N. Savit, Esq.
Patton Boggs LLP
1801 California Street, Suite 490
Denver, CO 80202

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

Melanie Garris
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