

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

September 7, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2011-566-M
v.	:	A.C. No. 24-01079-239191 Y035
	:	
DRUMLUMMON GOLD CORPORATION	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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 January 31, 2011, the Commission received from Drumlummon Gold Corporation (“Drumlummon”) a motion by counsel 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 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 November 24, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000239191 to Drumlummon for 13 violations that MSHA had issued to the operator in September and October 2010. Drumlummon states that it failed to timely contest the assessments because its safety manager, who is responsible for processing assessments, was out of the office on medical leave for an unexpected extended period. The operator contends that the safety manager took unscheduled leave for health-related issues on November 17, 2010 and initially was scheduled to return on December 15, 2010. The operator explains that due to unanticipated medical complications, the safety manager did not return to work until January 27, 2011. The assessment dated November 24, 2010, was delivered to the operator during the manager's absence, but because the manager's expected return on December 15 was before the date the assessment would become final, it was not acted upon. The operator notes that it filed its request to reopen days after the manager's return to work, when he discovered the delinquency, and about a month after the order became final.

On February 14, 2011, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment. The Secretary urges the operator to adopt procedures to ensure future assessments are timely contested and notes that she may oppose future motions to reopen assessments that are not timely contested.

Although the operator's internal procedures for handling assessments failed in this instance because it did not have a back-up system in place for processing assessments should the safety manager be unavailable, this is the operator's first request to reopen. Moreover, the operator's request was filed promptly upon the safety manager's discovery of the delinquent assessment and about one month after the assessment became final. Under the limited circumstances of this case, we conclude that the operator's failure to timely file a contest amounted to mistake or inadvertence.¹

¹ We note that in the safety manager's affidavit attached to the request to reopen, the safety manager states that he intends to prepare detailed instructions on how to handle assessments in his absence so as to avoid this type of oversight in the future. We agree with the Secretary that the operator should take such precautions. The Commission has held that an inadequate or unreliable internal processing system does not constitute inadvertence, mistake or excusable neglect so as to justify the reopening of an assessment which has become final under section 105(c) of the Mine Act. *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Elk Run Coal Co.*, 32 FMSHRC 1587, 1588 (Dec. 2010).

Having reviewed the facts and circumstances of this case, Drumlummon's request, and the Secretary's response, 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
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/s/ Patrick K. Nakamura
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