FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 25, 2009

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2008-879 A.C. No. 46-09020-123653
v.	:	Docket No. WEVA 2008-880 A.C. No. 46-09020-130296
DOUBLE BONUS COAL COMPANY,	:	Docket No. WEVA 2008-1354 A.C. No. 46-09020-148893
	:	Docket No. WEVA 2008-1355 A.C. No. 46-09020-145248
DYNAMIC ENERGY, INC.,	:	Docket No. WEVA 2008-1356 A.C. No. 46-09062-147434
	:	Docket No. WEVA 2008-1448 A.C. No. 46-09062-144939
FRONTIER COAL COMPANY,	:	Docket No. WEVA 2008-1357 A.C. No. 46-09227-145258
BLUESTONE COAL CORPORATION,	:	Docket No. WEVA 2008-1358 A.C. No. 46-08684-146783
	:	Docket No. WEVA 2008-1661 A.C. No. 46-08684-150175
JUSTICE HIGHWALL MINING, INC.,	:	Docket No. WEVA 2008-1359 A.C. No. 46-09123-147164
	:	Docket No. WEVA 2009-727 A.C. No. 46-09031-162833
and	:	
PAY CAR MINING, INC.	:	Docket No. WEVA 2008-1563 A.C. No. 46-08884-148891
	:	Docket No. WEVA 2009-812 A.C. No. 46-08884-170006

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

ORDER

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). In each of the 13 captioned cases, the Commission received a request 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 from the Department of Labor's Mine Safety and Health Administration ("MSHA") 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. *Id*.

In 11 of the 12 cases in which she filed responses, the Secretary originally did not oppose reopening of the assessments. While separate orders in those 12 cases were being finalized by the Commission, in the thirteenth case, *Pay Car Mining, Inc.*, Docket No. WEVA 2009-812 ("*Pay Car II*"), the Secretary, in a response dated March 2, 2009, opposed reopening the case. She requested that if the Commission voted to grant relief, it order the operators to prepay the penalties. She also indicated that she planned to file supplemental responses in the 11 other cases in which she had not opposed reopening. The Secretary did so shortly thereafter, filing a series of supplemental responses opposing those requests for relief on the same or similar grounds as stated in her response in Docket No. WEVA 2009-812.[1]

Because the Secretary's filings addressed the interrelationship between the operators in the cases and raised very serious issues regarding the operators' requests to reopen when those requests are considered together,[2] the Commission consolidated all 13 cases and issued a

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[1] In *Justice Highwall Mining, Inc.,* Docket No. WEVA 2009-727, the Secretary opposed reopening immediately in response to the motion to reopen, and did not file a supplemental response.

[2] In her March 2, 2009, submission, the Secretary stated that she

> opposes reopening in this case and the other cases because it has become clear over time that the operators in all of the cases are controlled by the same individual, James Justice; that they all use the same ineffective and unreliable system by which to process penalty assessments; that they all offer the same unpersuasive and unmeritorious excuses for failing to contest penalty assessments in a timely manner; and that they all exhibit the same attitude toward penalty assessments – an attitude of carelessness, indifference, and outright evasion.

Sec'y of Labor's Opposition to Request to Reopen Penalty Assessment and Request for Prepayment of Penalties at 2 (Docket No. WEVA 2009-812) (hereinafter "S. *Pay Car II* Opp'n").

schedule by which the parties could submit further evidence and argument on the issues raised by the Secretary's filings. 31 FMSHRC 339 (Mar. 2009). Consequently, in response to the Commission's order, the Secretary filed a response affirming that she was opposing all 13 requests to reopen.

The operators' reply submissions took the form of a response and five answers to the Secretary's opposition filings. The six filings by the operators covered (1) Docket No. WEVA 2009-727 (Mar. 5, 2009); (2) Docket No. WEVA 2008-1355 (Mar. 23, 2009); (3) Docket No. WEVA 2009-812 (Mar. 27, 2009); (4) Docket Nos. WEVA 2008-1356, WEVA 2008-1357, WEVA 2008-1358, and WEVA 2008-1359 (Mar. 27, 2009); (5) Docket Nos. WEVA 2008-1354, WEVA 2008-1448, WEVA 2008-1563, and WEVA 2008-1661 (Mar. 31, 2009); and (6) Docket Nos. WEVA 2008-879 and WEVA 2008-880 (Apr. 2, 2009).

The Secretary then filed a consolidated surreply to the operators' submissions, as permitted by the Commission's scheduling order. Finally, in a Notice dated May 22, 2009, the Secretary informed the Commission that the operators had submitted a check to MSHA for $649,740.14 to be deposited into an escrow account. That amount represented the full amount of the initial penalties at issue in the cases, plus interest, fees, and costs through May 14, 2009.

The Commission has considered the extensive submissions of the operators and the Secretary. For the reasons set forth below in their separate opinion, Chairman Duffy and Commissioner Young would reopen all 13 cases and remand the individual cases to the Chief Administrative Law Judge for further proceedings. Commissioners Jordan and Cohen, for the reasons set below in their separate opinion, would reopen five of the cases, and deny with prejudice the requests to reopen seven other cases. In one case, they would grant relief in part and deny in part.

Consequently, Docket Nos. WEVA 2008-1356, WEVA 2008-1357, WEVA 2008-1358, WEVA 2008-1359, WEVA 2009-812, and the penalty associated with Citation No. 7259169 in Docket No. WEVA 2008-1355 are hereby reopened and separately remanded 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 in each of the six cases. *See* 29 C.F.R. § 2700.28.

Furthermore, the effect of the split decision of the Commissioners as to the other requests to reopen is that the requests in Docket Nos. WEVA 2008-879, WEVA 2008–880, WEVA 2008-1354, WEVA 2008-1448, WEVA 2008-1661, WEVA 2008-1563, WEVA 2009-727, and Docket No. WEVA 2008-1355 (except for the penalty associated with Citation No. 7259169) are all denied.[3]

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[3] In deciding the motion to reopen in Docket No. WEVA 2008-1355, the Commission also considered pleadings that were filed in *Double Bonus Coal Co.*, Docket No. WEVA 2008-

Opinion of Commissioner Duffy and Commissioner Young:

We joined with our colleagues in consolidating these cases and taking further submissions from the parties because of the significant issues the Secretary raised in her March 2, 2009 filing when she reversed course in many of these cases and began opposing reopening. We also believe, similar to our colleagues, that if the merits of each of the cases were to be considered, the operators' grounds for reopening may be better in some cases than in others.

However, in the interest of efficiently disposing of these cases, some of which were filed over a year ago, we would reopen all of the cases on the ground that the operators' prepayment of the penalties, plus interest, fees, and costs, reasonably satisfies the concerns the Secretary expressed in her March 2 filing. Therein, she explained that the enormity of the total amount of the delinquent penalty payments compromises the deterrent effect of civil penalties at all of the operators' mines. S. *Pay Car II* Opp'n at 11. She further argued that, with regard to the failure to contest the assessments on a timely basis, "the operators' excuses reveal a carelessness that warrants prepayment of the full penalty amount if the motions are granted." *Id*. at 16-17. Consequently, the Secretary took the position that "if the Commission grants the operators' requests, the Secretary requests that the Commission do so conditioned upon the operators' payment of the full penalty amount, subject to refund by MSHA to the extent that Respondent prevails on the merits of the citations and/or penalties." *Id*. at 1-2; *see also id*. at 20.

Given that the operators paid the amounts at issue to MSHA (which will hold the money in escrow in an account that, presumably, will accrue interest), even before the Commission ruled on their pending motions to reopen, we would grant the requests to reopen with respect to all 13 assessments at issue. We do so without ruling on whether the Commission would have the authority to require prepayment of penalties, in these or any other cases, and without reaching the merits of any of the requests to reopen.

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

1596. That docket was administratively closed after it was learned that the request to reopen in it was duplicative of part of Docket No. WEVA 2008-1355. All documents in *Double Bonus Coal Co.*, Docket No. WEVA 2008-1596, will be transferred into Docket No. WEVA 2008-1355.

Separate opinion of Chairman Jordan and Commissioner Cohen:

I. Introduction

Between April 2008 and February 2009, six mine operators controlled by a single individual, James C. Justice, filed a total of fifteen motions seeking relief from final Commission orders.[1] The thirteen matters before us in this proceeding[2] involve delinquent penalties totaling over half a million dollars. Sec'y of Labor's Opposition to Request to Reopen Penalty Assessment and Request for Prepayment of Penalties at 11, *Pay Car Mining, Inc.,* Docket No. WEVA 2009-812 (hereinafter "S. *Pay Car II* Opp'n").[3] For the reasons set forth below, in seven dockets, we would deny relief. We would grant relief in five of the other dockets and order the Secretary to proceed with the case and file her penalty petition. In the remaining docket, we would grant relief in part and deny in part.

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 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

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[1] In its Order of March 13, 2009, the Commission consolidated 13 of these cases.

[2] The Commission previously issued an order in *Double Bonus Coal Co*., Docket Nos. WEVA 2009-810 and WEVA 2009-811, regarding the two other motions. 31 FMSHRC 358 (Mar. 2009). In that case, the Commission concluded that the proposed assessments at issue never became final orders of the Commission because they were never delivered to the operator. *Id*. at 360. The Commission denied the motions as moot, remanded the matters to the Chief Administrative Law Judge for further proceedings, and ordered the Secretary to file petitions for assessment of penalty. *Id*.

[3] In this March 2, 2009 submission, the Secretary opposed relief in all of the cases at issue here, explaining the relationships between the operators, their mail-handling systems, the excuses offered in their motions, and their history of late penalty contests.

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).

The Commission agreed to consolidate these proceedings because during our review of the operators' motions, we found that a disturbing pattern of carelessness had emerged in many of these proceedings, and we believed it would be beneficial to review all of these requests to reopen as a group. In so doing, we found a series of unpersuasive excuses for late-filed penalty assessments, and evidence of unreliable systems used by these operators when processing penalty assessments. We were also concerned that in many instances, the operators sought relief from these final orders only after receiving delinquency letters from the Mine Safety and Health Administration ("MSHA") or after being put on notice of enhanced enforcement efforts.

Moreover, a global approach to these motions (in addition to scrutiny of each individual case) is particularly helpful because, except for Double Bonus, each operator's point of contact for MSHA is the same in terms of the operator's address and contact person. The same individual, Patrick M. Graham,[4] was involved in most of the operators' responses to the assessments, including the responses of Double Bonus. S. *Pay Car II* Opp'n at 8-11. Also in many of the cases, the operators cited similar reasons for failing to timely contest penalty assessments. These were grounded in a faulty mail processing system. *Id*. at 12-17. For example, after proposed assessments issued in 2007 were mishandled, the operators claimed to have initiated a new system for timely contesting assessments in February 2008. *Double Bonus*, Docket No. WEVA 2008-1355, Mot. to Reopen at 2. The operators acknowledged that this system contained "some faults," and so a new system was established in June 2008. *Id.* This system also failed to work properly and so, as of January 2009, it was decided to "stamp in" assessment sheets "to avoid any mistakes." *Pay Car II* Mot. to Reopen at 2.

Reviewing these cases as a group also reveals the repetitive nature of the excuses offered for the late filings. The first two cases, filed in April 2008,[5] contained identical excuses for late-filed contests of assessments that were proposed three months apart. *Double Bonus Coal Co.*, Docket Nos. WEVA 2008-879 and WEVA 2008-880. Three other cases, filed by three different operators and involving assessments issued in March, April and May of 2008 contained identical excuses. *Dynamic Energy, Inc.*, Docket No. WEVA 2008-1448, *Pay Car Mining, Inc.*, Docket No. WEVA 2008-1563 ("*Pay Car I*"), and *Bluestone Coal Corp.*, Docket No. WEVA 2008-1661, Mots. to Reopen.

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[4] In an affidavit attached to some of the operators' responses, Mr. Graham identifies himself as the Director and General Manager of Safety/Human Resources for the "James C. Justice Companies."

[5] Double Bonus first attempted to reopen these assessment cases in February 2008, but sent the letter to MSHA rather than the Commission. The reopening request was sent to the Commission in April 2008.

Furthermore, according to the Secretary, as of March 2009, the total delinquencies for mines controlled by Mr. Justice equaled $870,843. S. *Pay Car II* Opp'n at 11. Of that amount, 70% was the subject of motions seeking relief before the Commission ($608,182) and 30% remained unpaid ($262,661). *Id*. We are deeply troubled by this significant amount of unpaid penalties, which contravenes Congress' intent that

> the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards.
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> . . . To be effective and to induce compliance, civil penalties, once proposed, must be assessed and collected with reasonable promptness and efficiency.

S. Rep. No. 95-181, at 41, 43 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 629, 631 (1978) (*"Legis. Hist."*). Senator Williams, the sponsor of the Mine Act, emphasized that the civil penalty was "the mechanism for encouraging operator compliance with safety and health standards." *Legis. Hist.* at 85. In reviewing the relevant legislative history, the D.C. Circuit concluded that "Congress was intent on assuring that the civil penalties provide an effective deterrent against all offenders, and particularly against offenders with records of past violations." *Coal Employment Project v. Dole*, 889 F.2d 1127, 1133 (D.C. Cir. 1989).[6]

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[6] The importance of civil monetary penalties was recognized by the Supreme Court even prior to the passage of the Mine Act. In *National Independent Coal Operators' Assoc. v. Kleppe*, 423 U.S. 388, (1976), a suit brought to enjoin the use of regulations adopted for assessing civil penalties under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976), the Court recognized that:

> The importance of § 109 [the Coal Act's civil penalty provisions] cannot be overstated. Section 109 provides a strong incentive for compliance with the mandatory health and safety standards. That the violations of the Act have been abated or miners withdrawn from the dangerous area before § 109 comes into effect is not dispositive; if a mine operator does not also face a monetary penalty for violations, he has little incentive to eliminate dangers until directed to do so by a mine inspector. . . . A major objective of Congress was prevention of accidents and disasters; the

It is against this backdrop that we now turn to the merits of the individual motions to reopen.[7]

II. Cases in Which Denial of Relief is Warranted

A. *Double Bonus Coal Co.*, Docket Nos. WEVA 2008-879 and WEVA 2008-880

On April 3, 2008,[8] Double Bonus asked the Commission to reopen two penalty assessments that had become final upon the operator's failure to contest the penalties within 30 days. Docket Nos. WEVA 2008-879 and 2008-880. On July 31, 2007, and October 30, 2007, MSHA had issued proposed penalty assessments to Double Bonus. After receiving no response, MSHA sent Double Bonus delinquency notifications on November 1, 2007, and January 23, 2008, for those assessments. Double Bonus alleged that it failed to timely respond to the proposed penalty assessments because of several personnel changes, different internal document routing procedures due to different delivery services, and a staff that was confused and failed to appreciate the importance of the proposed assessments or the time limits contained in them. Double Bonus also asserts that it "has established a procedure to insure that all assessment documents are properly channeled to the appropriate office."

After initially not opposing reopening, the Secretary changed her position in her March 2, 2009 opposition. She cited the two cases as the start of either a pattern of carelessness by the operators with respect to responding to assessments or an indication that they lack credibility regarding their explanations for their failures to timely respond. S. *Pay Car II* Opp'n at 12-17. She pointed out that the excuses offered in these two cases were identical even though the assessments were issued three months apart. *Id*. at 15. She also argued that the requests to reopen were not filed by Double Bonus until six months and two and one half months,

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> deterrence provided by monetary sanctions is essential to that objective.

Id. at 401.

[7] Invoking "the interest of efficiently disposing of these cases," slip op. at 4, our colleagues summarily grant relief in all of them. Although our colleagues acknowledge the "significant issues" raised by the Secretary in her opposition to the motions to reopen, they would grant relief without addressing any of them, because they consider the operator's prepayment of penalty to "reasonably satisf[y]" these concerns. *Id*. This would reward an operator whose track record in failing to contest penalties is egregious, and who accumulated so many delinquent penalties involving such a large sum of money that the Secretary took the unprecedented step of asking the Commission to condition any grant of relief on a penalty prepayment.

[8] See note 5, *supra*.

respectively, had passed from the time MSHA had sent delinquency notices to the operator regarding the assessments. *Id*. at 17 & n.39.[9]

In a reply dated April 2, 2009, and also in the Justice Companies' reply dated March 27, 2009 in *Pay Car II*, Double Bonus attributed the failure to timely respond to the assessments to a breakdown somewhere in the chain of custody of the assessments. Double Bonus stated that the breakdown may have occurred because of MSHA's change in delivery agents for assessments from the U.S. Postal Service to Federal Express. *Double Bonus* Reply at 2-3; *Pay Car II* Reply at 8, 13-14, 15. It identified another breakdown point in moving the assessments from the mine at Pineville, WV to its business office in Beckley, WV. *Double Bonus* Reply at 2-3; *Pay Car II* Reply at 16. Double Bonus claimed it first learned of the delinquencies in late January 2008, and thereafter moved to improve its handling of assessments. *Double Bonus* Reply at 3-4. Its reply includes a three-page affidavit from Pat Graham, the first half of which addressed these two cases. Double Bonus also argued that later cases show that the assessments in these cases may not have ever been delivered to Double Bonus. *Id*. at 2-3; *Pay Car II* Reply at 15-16.

In her April 13, 2009 consolidated reply, with respect to these two cases, the Secretary argues that safety director Patrick Graham in his affidavits and other evidence establishes a pattern of carelessness by the operators. S. Surreply at 6. With regard to the question whether Double Bonus received the assessments, the Secretary notes that Double Bonus received other correspondence from MSHA at the addresses on the respective assessments. *Id*. at 8. She also notes there is no explanation for why Double Bonus took so long to file requests to reopen after receiving delinquency notices. *Id*. at 8-9.

After carefully reviewing the operators' submissions in this matter, we are still unable to discern a cogent explanation of why the failure to timely contest these penalties might constitute excusable neglect. The pleadings merely identify several *potential* problems: personnel were confused by the delivery of mail by Federal Express, *Double Bonus* Reply (Aff. of Pat Graham at 1); there was a change in personnel receiving penalty assessments, *Double Bonus* Mot. at 1; confused staff members did not know the importance of proposed assessments and their related time deadlines, *id*. at 2; there were transmission problems to the Beckley office, *Double Bonus* Reply at 3. Reciting this list of possible excuses, with no detailed explanation as to why the penalties were not timely contested, does not justify relief. We therefore would deny Double Bonus' request to reopen in these two dockets.

[9] Although the delay in Docket No. WEVA 2008-897 was five months, not six, we are nevertheless troubled by the operator's lack of diligence in seeking relief.

B. *Double Bonus Coal Co.,* Docket No. WEVA 2008-1354; *Dynamic Energy, Inc.*, Docket No. WEVA 2008-1448; *Pay Car Mining, Inc.*, Docket No. WEVA 2008-1563 ("*Pay Car I*"); *Bluestone Coal Corp.*, Docket No. WEVA 2008-1661

On June 20, 2008, Double Bonus filed a motion to reopen an assessment dated April 29, 2008 that had become a final Commission order upon the operator's failure to contest the penalties. Docket No. WEVA 2008-1354. Double Bonus asserted that it first learned of this penalty assessment when Mr. Graham was reviewing data on MSHA's data retrieval system on June 11, 2008. It subsequently discovered that the proposed assessment had been lost or misplaced due to internal handling problems.

On July 2, 2008, Dynamic filed a motion to reopen a penalty assessment that had become a final Commission order upon the operator's failure to contest the penalties. Docket No. WEVA 2008-1448. On March 31, 2008, MSHA assessed proposed penalties resulting from four orders that were issued in December 2006. According to Dynamic, the proposed assessment was "misplaced or lost." In a letter dated June 19, 2008, MSHA informed Dynamic that the civil penalties were delinquent.[10] Dynamic contended that it conducted a search for the proposed assessment and could not locate it. Dynamic claimed that it had always intended to contest the violations because they had been designated by MSHA as unwarrantable. The motion states in part:

> We have experienced a serious fault in distribution of mail throughout the corporation. We previously installed a system that we believed would put the penalty assessments in the proper hands for contest or payment. That system has obviously failed. We are working on a new system that we expect will be successful. The rotation of newly hired persons is a problem as more experienced personnel move up. The training of new employees is lacking with respect to assessments. More intense training of new employees has already begun.

Dynamic Mot. to Reopen at 2.

On July 29, 2008, Pay Car filed a motion to reopen an April 29, 2008 proposed assessment to the operator arising from citations that were issued in February 2008. Docket No. WEVA 2008-1563. According to Pay Car, the proposed assessment was "misplaced or lost." Pay Car contended that it conducted a search for the proposed assessment and could not locate it. Pay Car also stated that it had always intended to contest the violations because they had been

[10] This assessment had been issued by MSHA on March 31, 2008 and had become final on May 2, 2008. Dynamic does not explain why Graham did not notice it when he reviewed MSHA's data retrieval system on June 11, 2008.

designated as significant and substantial. The motion also contained the same paragraph included in the July 2, 2008 Dynamic Motion to Reopen, quoted *supra*.

On August 13, 2008, Bluestone filed a motion to reopen a penalty assessment issued in May 2008. Docket No. WEVA 2008-1661. The assessment to Bluestone arose from nine citations issued during February and March 2008. According to Bluestone, the proposed assessment was "misplaced or lost." Bluestone stated that MSHA informed it by letter that the civil penalties were delinquent.[11] Bluestone contended that it conducted a search for the proposed assessment and could not locate it. Bluestone stated that it had always intended to contest the violations because of their significant and substantial nature. The motion also contained the same paragraph included in the July 2, 2008 Dynamic Motion to Reopen, quoted *supra*.

The Secretary originally did not oppose reopening in any of the cases. She did note in *Bluestone*, however, that in the previous three months the operator had become delinquent with respect to 30 penalties that had become final orders. She stated that her decision not to oppose reopening was based on the operator's representation that it had experienced a serious problem in processing assessments and that it was currently training new employees to correct that problem.

In her March 2, 2009 opposition in *Pay Car II*, the Secretary changed her position and opposed reopening of all four assessments. She noted the excuses in this Double Bonus case (WEVA 2008-1354) were identical to the excuses in another Double Bonus case (WEVA 2008-1355, discussed below). She argued that the excuses in the other three cases (*Dynamic Energy*, *Pay Car I*, and *Bluestone*), which had been filed over the course of six weeks between late June and mid-August, were also identical, although filed by three different operators. S. *Pay Car II* Opp'n at 15. She argued that the formulaic and repetitive excuses of poor mail handing offered by the operators demonstrated that either the excuses were not credible or that their shared mail processing system was inadequate a year ago and remained inadequate. *Id*. at 16. The Secretary also pointed out that in two of the cases, *Dynamic Energy* and *Bluestone*, the operators had not requested reopening until after such time as they would have received delinquency notices from MSHA regarding the unpaid assessments. *Id*. at 17.

The operators submitted a reply dated March 31, 2009. They noted that the problem in these cases was only with transfer of mail to the central office in Beckley. Mar. 31 Reply at 3-4. They stated that the time period in which this later problem occurred was limited to a two-week period between late April and mid-May 2008, and that "[t]here have been no similar problems with distribution since discovering the problem in June 2008." *Id*. They further noted that upon learning of the new problems, Graham took steps to retrain personnel on the transfer of mail to

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[11] Since the proposed assessment was issued on May 8, 2008, it should have been apparent to Graham when he reviewed MSHA's data retrieval system on June 11, 2008. If Graham had noticed it then, he could have filed a timely notice of contest, since the assessment did not become final until June 13, 2008.

Beckley, and that there were no problems after mid-May. *Id*. at 3-4, 6. A three-page affidavit from Graham is included in the March 31 reply, in which he states that all of the mines' respective addresses of record with MSHA, except for that of Double Bonus, were changed to Beckley.

The Secretary in her surreply stated that the operators in the four cases had provided no new evidence to justify reopening, specifically failing to provide any evidence of a potentially meritorious defense in the event the cases were reopened. Surreply at 11.

Other than a brief statement in an affidavit,[12] the only information the operators have provided us as an explanation for their failure to timely contest these penalties in these four cases is that a problem existed in transferring proposed assessments to their Beckley business office. Mar. 31 Reply at 4. This generalized excuse does not warrant reopening. Moreover, as stated in notes 10 and 11, *supra*, and note 13, *infra*, Graham's review of the MSHA data retrieval system every three months clearly was ineffective. Additionally, with this history of problems, it would be expected that Graham would check the data retrieval system more frequently than every three months. Accordingly, we would deny relief in these dockets.

C. *Justice Highwall Mining, Inc.*, Docket No. WEVA 2009-727

On January 27, 2009, Justice Highwall filed a request to reopen with regard to Proposed Penalty Assessment No. 000162833, dated September 16, 2008, which MSHA had issued for two citations in the sum of $120,000. Docket No. WEVA 2009-727. According to the operator, the proposed assessment became a final order either by Justice [Highwall]'s "inadvertence or mistake." It explained that the proposed assessment was received and signed for by Justice Highwall's receptionist on September 23, 2008. The proposed assessment was believed to have been electronically transferred to the operator's representative (to contest the penalty) but, according to computer records, was not transmitted. The operator discovered that the proposed assessment had become a final order of the Commission after it received a letter from MSHA dated December 10, 2008, stating that Justice Highwall was delinquent in the payment of penalties. *Justice Highwall* Mot. at 1-2.[13]

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[12] In the operator's response in *Double Bonus*, Docket Nos. WEVA 2008-879 and WEVA 2008-880, the affidavit of Graham discusses the circumstances arising in *Double Bonus*, Docket No. WEVA 2008-1354. Graham stated only that the operator had determined that a certain clerk had signed for certified mail on May 5, 2008 and placed the mail in the outbox to the Beckley office. Graham Aff. at 2.

[13] In its June 13, 2008 Motion to Reopen in Docket No. WEVA 2008-1354, Double Bonus represents that Graham "reviews the [MSHA] data retrieval system every three months looking for potential problems," and had done so on March 11, 2008 and June 11, 2008. *Double Bonus* Mot. at 2. Under this schedule, Graham would have checked the data retrieval system

In her response filed on February 4, 2009, the Secretary opposed the request on the basis that the operator had made no showing of exceptional circumstances that warrant reopening. She argued that the operator's statements that the failure to timely contest the proposed penalties arose from inadvertence or mistake, and that the proposed assessment was thought to have been electronically transferred to its representative, were conclusory, lacked evidentiary support, and were insufficient to establish a basis for reopening. The Secretary also faulted the motion for failing to plead a meritorious defense. S. Opp'n at 2-3.

The operator filed a reply to the Secretary's response in opposition. The submission, dated March 5, 2009, is primarily directed at the Secretary's meritorious defense argument. It includes four affidavits from Justice personnel regarding the two citations at issue.

The fifth affidavit included with the reply is from Graham, the safety director for Bluestone Industries. Therein, he states that the assessment at issue was one of three in which he informed his document processor that he intended to contest. He states that a procedure that had been successfully used in the past was again employed, whereby the processor, who he describes as a dependable employee, would scan the documents and attach them in an e-mail to the representative. Two of the assessments were forwarded to the representative on September 23, 2008, but the third was not. A hard copy of the assessment was found in the processor's files, but it had not been electronically transmitted. Graham states that it could not be determined whether the mistake was caused by computer, scanning, or human error, and that "[o]versight reviews have been put in place to prevent the same mistake in the future." Aff. at 2-4.

The Secretary in her April 13, 2009 consolidated surreply faulted the Justice response for (1) failing to provide authority for the proposition that the facts it presented justify a "presumptive meritorious defense;" (2) failing in the Graham affidavit to offer additional substantive information, such as identifying the date on which the processor was hired; and (3) including conclusory statements and unreliable hearsay in the Graham affidavit. Surreply at 11.

We would deny relief in this case. The rationale supplied by the operator is one of a litany of excuses involving faulty office procedures that have been offered in these proceedings. Graham's statement in his March 2009 affidavit that "[o]versight reviews have been put in place to prevent the same mistake in the future" rings hollow in light of the similar pledge in the operator's submission in *Double Bonus Coal*, Docket No. WEVA 2008-879 (which also involved Graham) that as of February 8, 2008, Double Bonus had "established a procedure to ensure that all assessment documents are properly channeled to the appropriate office," and similar commitments made in separate filings in the summer of 2008. By September 2008 (when this assessment in Justice Highwall was issued), these operators had been on notice that their office procedures to timely contest penalty assessments were sorely deficient, and they had

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again on or about December 11, 2008. Justice Highwall does not explain why Graham did not notice that the assessment dated September 16, 2008 had become final on October 23, 2008.

already filed eleven requests to reopen final orders. We would therefore deny the operator's request.

III. Cases in Which Granting of Relief is Warranted

A. *Dynamic Energy, Inc.*, Docket No. WEVA 2008-1356; *Frontier Coal Co.*, Docket No. WEVA 2008-1357; *Bluestone Coal Corp.*, Docket No. WEVA 2008-1358; and *Justice Highwall Mining, Inc.*, Docket No. WEVA 2008-1359

These four cases involve penalty assessments issued to four Justice companies in April 2008. According to each of the June 25, 2008 motions filed by the operators, their representative, James F. Bowman, claims that he placed in a single envelope four letters to MSHA stating that the respective operators wished to contest the penalties. Docket Nos. WEVA 2008-1356, 2008-1357, 2008-1358 and 2008-1359. Although Bowman asserts that the envelope with the four letters was sent by certified mail on April 28, 2008, he cannot locate the receipt for the mail. Bowman stated, "A good faith effort was made to send the Notices of contest which [have] unfortunately been lost." Mot. at 2. Bowman further avers that the postal service "could not track mail without a number" and refers to his computer log and business checking account as support for his allegations. *Id.* at 1-2. However, initially, no affidavits or documents were filed to support these statements. Bowman further stated that, when reviewing MSHA's data base, he discovered that the proposed assessments had become final orders in May 2008. The penalties in the Dynamic Energy case were for over $285,000, while the penalties in the other three cases were significantly less than those for Dynamic, for a total of more than $290,000 in all four dockets.

In her initial responses, the Secretary stated that she had no record that the penalty contest forms were received but, at least at that time, had no basis for questioning that the letters Bowman described were sent. Later, however, the Secretary filed her supplemental response opposing the reopening on the ground the four cases involved Justice-controlled companies, and that the filing of 11 motions to reopen over the course of a five-month period by Justice-controlled companies had revealed a pattern of carelessness that merited denial of reopening. *See* Sec'y's Supplemental Resps. in Opp'n to Respt's Mot. to Reopen Civil Penalties at 1 (received Mar. 9, 2008, in each case). In the alternative, the Secretary requested that if the Commission grants reopening, it do so only on the condition that the operators pay the penalties in their full amounts pending a decision on the merits of the citations, orders, and penalties. *Id.* at 4; Sec'y's Consolidated Opp'n to Reopening Requests at 3 (filed Mar. 26, 2008).

In the operators' reply, a submission dated March 27, 2009, Bowman, as the "Representative [for] James C. Justice," reiterated his original explanation for the failure to file timely contests of the four assessments. In support, he submitted an affidavit, as the owner of Bowman Industries, regarding how he came to mail the contests together by certified mail, what he did when he learned that the envelope was not received by MSHA, and his unsuccessful search for the certified mail receipt. He also submitted a copy of a statement showing that on

April 28, 2008, he used his debit card to make a $3.96 purchase at the Midway, WV post office, which he stated was for the certified mail in question. He also submitted evidence and argument as to his good character and credibility, and argued that because this case is different from the other cases at issue here (in that there was a genuine attempt at a timely filing), these cases should be judged apart from the cases in which the Secretary argues that there was a pattern of carelessness in responding to penalty assessments.

The Secretary in her April 13, 2009 surreply affirmed her opposition to reopening the four cases. She stated that Bowman has not submitted a copy of the Postal Service forms that would support his allegations, such as the Certified Mail Receipt or the Domestic Return Receipt. Surreply at 7, 10-11. The Secretary argued that this failure provides further evidence of carelessness and inattentiveness to record keeping. *Id*. at 7-8. The Secretary submits that as the operators voluntarily hired Bowman, they must live with the consequences of retaining someone who appears to have lacked the necessary resources and systems to ensure compliance with MSHA and Commission rules. *Id*. at 6-7.

We would grant the operators' motions in these four cases. Their submissions, supported by adequate documentation (including copies of the contest letters, an affidavit and a copy of Bowman's debit card statement indicating a purchase at the post office on the day in question) indicate that the operators mailed their requests for a hearing to MSHA within the 30-day time limit. The affidavit submitted is sufficiently reliable and supports this allegation. In the circumstances presented here, we find that the operators' failure to timely file their hearing requests with MSHA was due to inadvertence or mistake within the meaning of Rule 60(b)(1). *See Mingo Logan Coal Co.*, 31 FMSHRC ___, slip op. at 1-2, No. WEVA 2009-835 (June 1, 2009) (granting operator's motion to reopen where MSHA had no record of receiving a penalty contest form, but operator submitted affidavit stating that its safety manager had sent a timely contest form). We also note that all four motions seeking relief were filed in a timely manner, either only two days after the delinquency notice was issued (Frontier Coal), or, in the case of the other three operators, prior to receipt of the delinquency notice.

Consequently, we would reopen these matters and remand them 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.

B. *Pay Car Mining*, Docket No. WEVA 2009-812 ("*Pay Car II*")

In a motion dated February 3, 2009, Bowman sought reopening of a December 2, 2008 assessment he discovered had been sent in one day late. Docket No. WEVA 2009-812. The assessment contained proposed penalties totaling $26,777. Bowman stated that inclement weather prevented the contest of the assessment from being mailed the previous day.

The Secretary did not file an individual response to the motion, but instead filed her March 2, 2009 opposition, in which she began to oppose reopening of almost all of the James

Justice cases. The portion of the response directed at the circumstances in this case is relatively brief. The Secretary argues that the operator failed to make a showing of exceptional circumstances, and that the explanation provided fails to name the individuals involved and is not supported by affidavits from them. S. *Pay Car II* Opp'n at 5-6. The Secretary also states the motion did not even attempt to establish a meritorious defense, and failed to address the issue of good faith. *Id.* at 6.

In his March 27, 2009 reply, Bowman, on behalf of Pay Car, addressed the Secretary's response, both with respect to circumstances of the late filing in this case and the overall pattern alleged by the Secretary. Bowman set forth in detail how the assessment was handled. *Pay Car II* Reply at 3-5. He stated that action on the assessment did not occur until after the holidays, at which point Bowman was training a new secretary, his wife, on the handling of assessments. According to Bowman, they prepared the contest for mailing on January 5, 2009, but unlike the other seven contests prepared that day, it was not taken to the post office. That it was left behind was not discovered until January 9, 2009, a day on which weather conditions were too unsafe to make a trip to the post office, so it was taken the following day, and thus was mailed one day late. Affidavits from Bowman, his wife, and Patrick Graham regarding this case are included. Pay Car also devoted one page of its reply to addressing the meritorious defense requirement. *Id*. at 7.

The Secretary in her April 13, 2009 surreply faults Bowman for not addressing why the assessment was not processed by his company until after it had sat for three weeks. Surreply at 7. The Secretary also takes issue with Pay Car limiting its discussion of its meritorious defense to one page of argument, unsupported by affidavits from persons with knowledge of the relevant facts. *Id*. at 12.

The Commission has previously granted a motion to reopen a final order when a penalty contest has been filed shortly after it was due and the delay was caused by mistake or inadvertence. *See, e.g., Ruscat Enters., Inc.*, 31 FMSHRC 112 (Feb. 2009) (reopening final order when operator was three days late in mailing the contest form); *Oak Grove Res.*, *LLC,* 31 FMSHRC 115 (Feb. 2009) (reopening final order when operator was one day late in mailing the contest form); *Dickinson-Russell Coal Co.*, 31 FMSHRC ___, slip op. at 2, No. VA 2009-175 (June 10, 2009) (same). Accordingly, we would grant the motion and reopen the final order in this docket.

IV. Case Warranting Grant of Relief in Part and Denial of Relief in Part – *Double Bonus Coal Co*., Docket No. WEVA 2008-1355

On April 1, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued proposed penalty assessment No. 000145248 to Double Bonus for penalties totaling $79,300. After this assessment became final because of the lack of a contest by the operator, Bowman filed a motion to reopen on June 20, 2008. Docket No. WEVA 2008-1355. Double Bonus asserts that it first learned of the penalty assessments when its safety director was

reviewing data on MSHA's data retrieval system on June 11, 2008. It subsequently discovered that the proposed assessments were not contested due to internal handling problems. Specifically, it claims that when the proposed assessment was transferred from the office where it was delivered to an accounting office, it was lost or misplaced. It states that a clerk received the proposed assessment on April 9, 2008, gave the documents to a mine official, and he sent them to the accounting office. *Double Bonus* Mot. at 2.

A second motion to reopen was filed by counsel on August 1, 2008. In that motion, however, counsel requested reopening only for the civil penalty proceeding for Citation No. 7259169. Counsel also filed a supplemental pleading on March 23, 2009, responding to the Secretary, in which he stated that the motion to reopen was filed because the assessment pertained to Citation No. 7259169, arising from an investigation into a fatality at the mine. He noted that the operator had filed a timely pre-penalty notice of contest of that citation, pursuant to Commission Procedural Rule 20, 29 C.F.R. § 2700.20, demonstrating its intent from the outset to contest the penalty, and filed its motion to reopen when it realized a mistake had been made. March 26 Reply at 2. In addition, he objected to the Secretary's attempt to group this motion to reopen with others pending before the Commission. In his March 2009 submission, unlike in his August 2008 motion, counsel requested that all of the penalties in the docket be reopened, not just the one associated with Citation No. 7259169. However, he failed to provide any explanation as to why the other final orders warranted reopening.

In her April 13, 2009 surreply in these cases, the Secretary urges the Commission to reject the operator's argument on many grounds, including the fact that the operator failed to explain how its contest of one citation justifies reopening the other 45 citations in the assessment case. Surreply at 9.

The Commission has previously granted motions to reopen when the operator has filed a notice of contest of the underlying citations. For example, in *Phelps Dodge Sierrita, Inc.*, 24 FMSHRC 661 (July 2002), the operator inadvertently paid the assessment at issue, along with fourteen other assessments it intended to pay. In granting relief, the Commission indicated that "[t]he most compelling indication of Phelps Dodge's intention to contest this penalty is the notice of contest it filed concerning [the underlying citation]." *Id*. at 662; *see also Holnam Texas Ltd.*, 24 FMSHRC 436 (May 2002) and *Kaiser Cement Corp.*, 23 FMSHRC 374 (Apr. 2001) (both granting relief from final orders when notices of contest for the underlying citations had been filed).[14]

However, we believe the Secretary is correct in arguing that granting relief on this basis does not merit reopening of the remaining penalties in the same assessment. Other than the general excuse about internal document transmittal problems (similar to those offered in many of the other cases discussed herein), the operator provides no information on which to justify a

[14] All three of these cases also involved inadvertent payment of the penalties by the operator.

claim that the failure to timely contest the penalty was based on excusable neglect. Consequently, we would grant the reopening of the $723 penalty assessed for Citation No. 7259169, and deny relief for the other penalties in the April 1, 2008 Assessment Case No. 000145248.

V. Conclusion

For the foregoing reasons, we would grant the requests to reopen in *Dynamic Energy, Inc*., Docket No. WEVA 2008-1356; *Frontier Coal Co.*, Docket No. WEVA 2008-1357; *Bluestone Coal Corp.*, Docket No. WEVA 2008-1358; *Justice Highwall Mining, Inc.*, Docket No. WEVA 2008-1359; and *Pay Car Mining*, Docket No. WEVA 2009-812; and the penalty associated with Citation No. 7259169 in *Double Bonus Coal Co.*, WEVA 2008-1355. We would order the Secretary to proceed with these cases and file her penalty petitions within 45 days of this order. We would deny the requests to reopen in *Double Bonus Coal Co*., Docket Nos. WEVA 2008-879 and WEVA 2008-880; *Double Bonus Coal Co.,* Docket No. WEVA 2008-1354; *Dynamic Energy, Inc.*, Docket No. WEVA 2008-1448; *Pay Car Mining, Inc.*, Docket No. WEVA 2008-1563 ("*Pay Car I*"); *Bluestone Coal Corp.*, Docket No. WEVA 2008-1661; and *Justice Highwall Mining, Inc*., Docket No. WEVA 2009-727; and with regard to the remaining penalties in *Double Bonus Coal Co*., Docket No. WEVA 2008-1355.

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Mary Lu Jordan, Chairman

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