FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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November 30, 2009

	:	Docket No. WEVA 2009-110
	:	A.C. No. 46-08693-145240
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2009-688
ADMINISTRATION (MSHA)	:	A.C. No. 46-08693-164121
	:	
v.	:	Docket No. WEVA 2009-689
	:	A.C. No. 46-08693-167069
HIGHLAND MINING COMPANY	:	
	:	Docket No. WEVA 2009-1037
	:	A.C. No. 46-06558-169988

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

ORDER

BY: Duffy, Young, and Cohen, 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 14, 2008, the Commission received from Highland Mining Company ("Highland") a motion made 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). On January 21, 2009, the Commission received two more such motions from Highland, and on March 25, 2009, the Commission received a fourth motion.[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).

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2009-110, WEVA 2009-688, WEVA 2009-689, and WEVA 2009-1037, all captioned *Highland Mining Co.*, and all involving similar procedural issues. 29 C.F.R. § 2700.12.

With respect to Docket No. WEVA 2009-110, on April 1, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued proposed penalty assessment No. 000145240 to Highland. In its motion to reopen the assessment, Highland acknowledges that a security guard, no longer employed by Highland, signed for the package containing the assessment. Highland states that the security guard left the package in the guard house and that it was never seen again. Highland further explains that it learned of its delinquency with respect to the assessment around July 15, 2008, when it received a letter from MSHA. It did not file a motion to reopen for another three months.

With respect to Docket No. WEVA 2009-688, on September 30, 2008, MSHA issued proposed penalty assessment No. 000164121 to Highland. The record indicates that the proposed penalty assessment was signed for by the company receptionist but was subsequently lost within the operator's internal mail system and never delivered to Highland's safety director for processing. Highland's motion describes the procedures the receptionist was to have followed. After receiving a notice from MSHA dated December 30, 2008, stating that payment on the proposed assessment was delinquent, the safety director promptly investigated the matter and notified counsel, who filed a motion to reopen on January 21, 2009.

With respect to Docket No. WEVA 2009-689, on October 28, 2008, MSHA issued proposed penalty assessment No. 000167069 to Highland. Highland states that the proposed penalty assessment was misplaced on the desk of the operator's safety director, Jason Jude, and that, as a result, Highland inadvertently failed to transmit the proposed penalty assessment to counsel for the filing of a contest. After discovering the mistake, the operator states that it immediately transmitted the matter to counsel, who submitted the contest to MSHA that same day. By letter dated December 23, 2008, MSHA rejected the submission as untimely. The operator filed a motion to reopen on January 21, 2009.

With respect to Docket No. WEVA 2009-1037, on December 2, 2008, MSHA issued proposed penalty assessment No. 000169988 to Highland. Highland states that the proposed penalty assessment was misplaced on the desk of the operator's safety director, Lewis Sheppard, and that, as a result, Highland inadvertently failed to transmit the proposed penalty assessment to counsel for the filing of a contest. After the operator received a delinquency letter from MSHA dated February 26, 2009, operator's counsel filed a motion to reopen on March 25, 2009.

The Secretary only opposes the reopening of the first assessment that Highland seeks to reopen. She opposes reopening on the ground that the operator has conceded that it had no standard practice or procedure for deliveries to the guard house and has failed to explain why it waited three months to file a request for reopening after learning of the delinquency. The Secretary does not oppose reopening the other three assessments.[2]

[2] We consider the Secretary's position in the three cases in which she does not oppose reopening in light of the provisions of the Informal Agreement between Dinsmore & Shohl Attorneys and Department of Labor – MSHA – Attorneys Regarding Matters Involving Massey

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).

A. Whether Highland Demonstrated Good Cause for Failing to Timely Contest the Penalties

1. Assessment No. 000145240

Having reviewed Highland's motion and the Secretary's response, we deny the motion with prejudice. We have held that an inadequate or unreliable system for delivering internal mail 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 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066 (Dec. 2008); *see Gibbs v. Air Canada,* 810 F. 2d 1529, 1537-38 (11th Cir. 1987) (holding that default caused by failure to establish minimum procedural safeguards for determining that action in response to summons and complaint was taken does not constitute default through excusable neglect). The Secretary correctly points out that Highland concedes that "there was no standard practice or procedure for mail and packages delivered to the guard house." Mot. at 2. However, Highland's motion also indicates at another point that guards were responsible for delivering packages that they received to the business office or addressee within the company. *Id*. In light of Highland's concession and its apparently inconsistent explanation of its procedures, we conclude that it has failed to establish good cause for reopening the proposed penalty assessment.

Energy Company Subsidiaries" dated September 13, 2006. That agreement was in effect when the Secretary filed her responses. Therein, the Secretary agreed not to object to any motion to reopen a matter in which any Massey Energy subsidiary failed to timely return MSHA Form 1000-179 or inadvertently paid a penalty it intended to contest so long as the motion to reopen is filed within a reasonable time. Thus, we assume that the Secretary was not considering the substantive merits of a motion to reopen from any Massey Energy subsidiary so long as the motion was filed within a reasonable time. Such agreements obviously are not binding on the Commission, and the Secretary's position in conformance with the agreement in this case has no bearing on our determination on the merits of the operator's proffered excuse. The Commission has been informed that, since the time the Secretary filed her responses, she has rescinded the agreement.

2. Assessments Nos. 000164121, 000167069, and 000169988

The three assessments were issued in a period of a little over two months, and Highland has provided a different reason for its failure to timely respond to each. While this could be a series of random mistakes, it could also be an indication of inadequate procedures. We are particularly concerned that in late December 2008 Highland was put on notice by MSHA that it had failed to timely respond to Assessment Nos. 000164121 and 000167069, yet Highland nevertheless failed to timely respond to still another assessment, No. 000169988.

Consequently, we hereby deny the motions to reopen these three assessments, but without prejudice. Should Highland renew its reopening requests, it must do so within 30 days, and fully explain the circumstances in the three failures to timely contest the proposed assessments. It must also address what it has done to ensure that it does not misplace penalty assessments in the future and to ensure that it responds to them in a more timely manner, in order to avoid a repeat of the mistakes it outlined in its four motions.

B. Highland's Promptness in Seeking Reopening

Under Rule 60(c), a motion to reopen, regardless of its merit, is only granted if it is filed within a reasonable time. In the context of penalty assessments, in considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice or other notification from MSHA and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009).

Here, with regard to the first assessment, Highland fails to explain why, after it learned of the delinquency, it waited three more months before filing its request to reopen.[3] In contrast, with respect to the other three assessments, Highland acted promptly, filing each motion to reopen within 30 days after learning that it had failed to file a timely contest.

In the future, to save time and conserve its resources, the Commission will ordinarily analyze the question of whether the request to reopen was filed in a reasonable time in the following manner. Motions to reopen received within 30 days of an operator's receipt of its first

[3] The amount of time is especially relevant, because the Secretary's response raised that issue, and Highland did not file a reply providing an explanation. 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.

notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time.

Motions to reopen filed more than 30 days after receipt of such information from MSHA should include an explanation for why the operator waited so long to file for reopening. The lack of such an explanation is grounds for the Commission to deny the motion.

In addition to being prompt in filing a motion to reopen, an operator must also set forth an adequate explanation of the reasons for its delinquency, as we have previously held.

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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

Chairman Jordan, concurring and dissenting:

I agree with the majority that the motion to reopen in Docket No. WEVA 2009-110 should be denied with prejudice. However, unlike my colleagues, I would also deny with prejudice the motions in the remaining three dockets.

A review of the four motions submitted by the operator reveals a system that fails to give appropriate priority to proposed penalty assessments sent by MSHA. The four cases before us involve deliveries of proposed assessments that occurred from April 2008 until December 2008, an eight month time frame. During this period problems occurred at every stage of the operator's internal mail system. For example, in Docket No. WEVA 2009-110, the assessment was delivered to the guard house but apparently never went further. In Docket No. WEVA 2009-688, the safety director states that he never received the proposed assessment and offers only the general speculation that it was lost or misplaced after the receptionist signed for the delivery.

In Docket Nos. WEVA. 2009-689 and 2009-1037, the safety directors did receive the assessments. But even that modest success did not result in timely contests of those proposed penalties. In the first case, the safety director declares that, in completing the contest, he was interrupted by other job duties. Jude Aff. at 2. In the second case, a different safety director states that he was interrupted while completing the contest because he "had to address other important company matters as part of [his] job duties." Sheppard Aff. at 2. These explanations do not rise to the level of "mistake, inadvertence, or excusable neglect"; a safety director will always have a multitude of tasks, and the mere existence of other job duties does not warrant relief.

In sum, indifference, as opposed to inadvertence, would appear to more accurately describe the underlying reason for Highland's pattern of untimely contests, and constitutes grounds for denying its motions to reopen in these cases. *See Rogers v. Hartford Life & Accident Ins. Co.*, 167 F.3d 933, 938-39 (5th Cir. 1999) (finding that the district court did not abuse its discretion in refusing to set aside default judgment when a failure to establish minimum internal procedural safeguards was at least a partial cause of company's failure to respond to complaint).

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Mary Lu Jordan, Chairman

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