FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 10, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2009-1738
v.	:	A.C. No. 46-07938-180891
ELK RUN COAL COMPANY	:	

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

ORDER

BY: Jordan, Chairman; Young, Cohen, 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 July 28, 2009, the Commission received from Elk Run Coal Company 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). On August 17, 2009, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

This motion involves Assessment Case No. 000180891, issued to Black Castle Mining Company ("Black Castle") and served upon Elk Run Coal Company ("Elk Run") on or about April 1, 2009. The Assessment Case includes 16 citations, of which 13 citations are significant and substantial ("S&S").[1] All of the citations were issued between February 17 and February 25, 2009. Elk Run filed with its motion an affidavit from Kevin Deaton, the safety director for Black Castle. According to Deaton's affidavit, Black Castle is a subsidiary of Elk Run, and idled the subject mine on April 9, 2009, leaving only a skeleton crew. The crew stacked the mail during the time the mine was idled and did not date-stamp it. Deaton did not learn that the assessment had been received until July 2009, when the mine was removed from idle status. At this time, Deaton gave the Assessment to counsel, indicating that the company intended to contest the 13 S&S violations.

The Secretary does not oppose the Motion.

The reasons offered by Elk Run do not amount to inadvertence or excusable neglect within the meaning of Fed. R. Civ. P. 60(b), and do not constitute good cause to reopen the assessment, which became a final order of the Commission in May 2009. The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not shown grounds for reopening the assessment. *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); *see Gibbs v. Air Canada*, 810 F. 2d 1529, 1537-38 (11th Cir. 1987). In this case, the fact that an operator idles a mine does not relieve it of its obligation to open and deal with the mail it receives. To allow three months of mail to stack up unopened, without further explanation of how this was allowed by the management who made the decision to idle the mine, is not inadvertence; it is irresponsibility. Deaton's affidavit states, "The crew of the mine did not understand the importance of the timing of the filing of the 1000-179 form." However, this is a failure of training by management, a failure which could have been prevented by the simplest and most basic precautions.

Moreover, Elk Run has demonstrated a pattern of failing to deal adequately with proposed assessments received from MSHA. On July 2, 2007, Elk Run sought reopening of an assessment which had become final because it was "inadvertently lost in the office of the safety director." *Elk Run Coal Co.*, 29 FMSHRC 613, 613 (Aug. 2007). The Commission remanded the case to the Chief Administrative Law Judge for a determination of good cause, *id.*, and the Chief Administrative Law Judge subsequently reopened the final assessment. Unpublished

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[1] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

Order dated Sept. 4, 2008. On January 28, 2008, Elk Run sought reopening of three citations within a proposed assessment which its attorney had failed to contest due to an unspecified "clerical error." *Elk Run Coal Co.*, 30 FMSHRC 423, 424 (June 2008). The Commission remanded the case to the Chief Administrative Law judge for a determination of good cause, *id.*, and the Chief Administrative Law Judge subsequently reopened the final assessment. Unpublished Order dated Sept. 4, 2008. On December 19, 2008, Elk Run sought reopening of an assessment which became final because its safety director failed to successfully fax the assessment form to counsel, and did not check whether the fax had been received. *Elk Run Coal Co.*, No. WEVA 2009-511 (motion pending).

Based on the foregoing, we conclude that Elk Run has failed to provide an adequate basis for the Commission to reopen the penalty assessment. *See Pinnacle Mining*, 30 FMSHRC at 1062-63 (denying relief because operator's excuse was insufficient); *Pinnacle Mining*, 30 FMSHRC at 1067-68 (same). Accordingly, we deny Elk Run's request to reopen.

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Mary Lu Jordan, Chairman

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

Commissioner Duffy, dissenting:

I would grant this unopposed request to reopen.

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Michael F. Duffy, Commissioner

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