FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 15, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2009-1759
ADMINISTRATION (MSHA)	:	A.C. No. 46-09020-180693
	:	
v.	:	Docket No. WEVA 2009-1761
	:	A.C. No. 46-09020-183777
DOUBLE BONUS COAL COMPANY	:	

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 August 4, 2009, the Commission received motions seeking to reopen two penalty assessments issued to Double Bonus Coal Company ("Double Bonus") that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[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).

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 inadvertence or mistake. *See* 29 C.F.R.

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2009-1759 and WEVA 2008-1761, both captioned *Double Bonus Coal Co.* and involving similar procedural issues. 29 C.F.R. § 2700.12.

§ 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 March 31, 2009, and April 28, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued two proposed penalty assessments to Double Bonus. Double Bonus asserts that it first learned of these penalty assessments when representative, James Bowman was reviewing data on MSHA's data retrieval system. It claims that MSHA failed to properly serve the proposed assessments because MSHA sent the assessments by U.S. certified mail rather than by Federal Express.

The Secretary opposes reopening and maintains that the proposed penalty assessments were properly delivered via U.S. certified mail to the operator's legal address of record and were, in fact, received and signed for by the operator. She asserts that the operator in its reopening request in *Double Bonus Coal Co.*, 31 FMSHRC 358 (Mar. 2009), stated that it had difficulties in receiving deliveries at the address at Route 12/3 Pinnacle Creek Road. Because of those difficulties, the Secretary asserts that she used the legal ID address of record.

Double Bonus then filed an answer to the Secretary's opposition, in which it acknowledged that it received the penalty assessments but claimed that it was expecting penalty assessments to be delivered by Federal Express as a result of a prior MSHA instruction and that delivery by U.S. Mail caused confusion among its personnel. It further claimed that the certified mail may have been overlooked as junk mail.

The Secretary filed a reply, contending that the operator's claim was specious in light of the fact that it "undisputedly received the proposed penalty assessment." S. Reply at 1.

Having reviewed Double Bonus' requests and the Secretary's responses, we deny the motions with prejudice. The record reveals that Double Bonus unquestionably received and signed for the proposed assessments. We note that the Commission Procedural Rules expressly authorize the Secretary to utilize certified mail when notifying operators of proposed penalty assessments. 29 C.F.R. § 2700.25. Moreover, we are not persuaded by the operator's proffered reasons for failing to timely respond to the penalty assessments, i.e., that the certified mail delivery caused confusion and that the operator may have treated its certified mail, the receipt of which was acknowledged by one of its employees, as casually as junk mail. 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 reopening of an assessment that 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).

Accordingly, we conclude that Double Bonus has failed to establish good cause for reopening the proposed penalty assessments and deny its motions with prejudice. *See Highland Mining Co.*, 31 FMSHRC 1313, 1314-15 (Nov. 2009) (denying motion to reopen with prejudice when the operator's security guard signed for the proposed penalty assessment and operator claimed to have never seen it again).

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Mary Lu Jordan, Commissioner

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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

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Patrick K. Nakamura, Commissioner

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