FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 27, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 2009-370
	:	A.C. No. 46-08436-157026
PERFORMANCE COAL COMPANY	:	

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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 December 1, 2008, the Commission received from Performance Coal Company ("Performance") a motion by counsel seeking 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 July 15, 2008, the Department of Labor's Mine Safety and Health Administration issued a proposed penalty assessment for 19 violations totaling $34,269 to Performance. Performance states that it received the proposed penalty assessment on July 25, 2008. It explains that it failed to timely process the proposed assessment because of a change in safety directors at the company around the time of its receipt of the proposed assessment. Specifically, Performance states that the transition occurred between June and August 2008. In June and July 2008, Performance states that its current safety director was frequently out of the office for up to two weeks at a time, while the new safety director, who did not assume responsibility until August, was being trained. It asserts that during this transition, the proposed assessment was misplaced when files and offices were moved and was not discovered until October 20, 2008.[1] Upon discovering the overdue assessment, the operator states that it promptly submitted the assessment to its counsel on October 21.

The Secretary opposes reopening the proposed penalty assessment, maintaining that Performance has failed to establish the existence of "exceptional circumstances." Specifically, the Secretary contends that for two months, the operator's system for handling penalty assessments was inadequate, which militates against reopening. She states that inadequate or unreliable internal procedures do not constitute an adequate excuse to reopen.

[1] We are concerned by the admission of the current safety director that "any forms received during this transition process between safety directors would not have been promptly received." Aff. of Gregory Raines at 2. During periods of personnel changes, back-up systems should be instituted to make sure that penalties are contested in a timely manner. Rather than assuming that late-filed penalty contests are "justifiable and unavoidable" during such transitions, Mot. at 4, a prudent operator would institute an alternate procedure to ensure that penalties are contested by the clear statutory deadline.

Having reviewed Performance's request and the Secretary's response, we conclude that Performance has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Performance's explanation that it failed to file a timely contest due to a "change in safety directors," without further elaboration, does not provide the Commission with an adequate basis to justify reopening of the assessment.[2] Accordingly, we deny without prejudice Performance's request. *See, e.g., Eastern Associated Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

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Mary Lu Jordan, Chairman

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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

[2] We note that in addition to the operator's initial two month delay in handling the final proposed penalty assessment, it appears that counsel for the operator delayed for approximately 40 more days in filing a request to reopen without any explanation for this delay. Thus, the law firm took 10 days longer to act than the Mine Act permits for contesting the penalty in the first instance. A party seeking to reopen a final proposed assessment must explain such delays, in addition to any delays in failing to timely contest.

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