FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 17, 2009

SECRETARY OF LABOR,	:	Docket No. WEVA 2009-44
MINE SAFETY AND HEALTH	:	A.C. No. 46-05741-143195
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2009-45
v.	:	A.C. No. 46-05741-139339
	:	
EXTRA ENERGY, INC.	:	Docket No. WEVA 2009-46
	:	A.C. No. 46-08647-135933

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

ORDER

BY: Jordan 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 7, 2008, the Commission received requests to reopen three penalty assessments issued to Extra Energy, Inc. ("Extra") 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).

On January 10, 2008, February 7, 2008, and March 6, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued three separate proposed penalty assessments to Extra. According to James F. Bowman, who filed the requests to reopen as Extra's representative, Extra paid six of the eight penalties proposed in the March assessment (Docket No. WEVA 2009-44), but did not otherwise respond.[2] Consequently, on April 16, 2008,

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2009-44, WEVA 2009-45, and WEVA 2009-46, all captioned *Extra Energy, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

[2] Pursuant to Commission Procedural Rule 3(b)(4), 29 C.F.R. § 2700.3(b)(4), James F. Bowman has been granted leave to practice before the Commission. *Double Bonus Coal Co.*, 31

May 7, 2008, and May 29, 2008, MSHA sent three separate delinquency notices to Extra with respect to the unpaid assessments. Extra now requests reopening of all three assessments so that it may contest the penalties it did not pay, as well as one of the March assessment penalties (for Citation No. 7277203) that it states it paid in error. Extra claims that it instructed an unnamed "representative" to contest the penalties in each assessment it did not pay, but that individual did not do so, apparently after Extra failed to return a phone call seeking confirmation from the company regarding its intent to contest the penalties.

The Secretary opposes reopening on the ground that Extra's explanation for failing to timely file notices of contests in the three cases is conclusory and does not constitute the "exceptional circumstances" necessary to support reopening. The Secretary further states the reopening is unjustified here because Extra failed to identify facts which, if proven, would establish a meritorious defense, and because of Extra's failure to explain why the operator, after it was sent delinquency notices by MSHA, waited four to five-and-a-half months to request reopening of the assessments.

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 noted that Rule 60(b) "is a tool which . . . courts are to use sparingly . . . ." *Atlanta Sand & Supply Co.*, 30 FMSHRC 605, 608 (July 2008) (citing *JWR*, 15 FMSHRC at 789). 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).

We conclude that relief is not justified in this case. Although relief from a final order may be warranted in cases of inadvertence, mistake, surprise or excusable neglect, none of these circumstances are apparent here. Assuming that the operator's assertions are true, they present a scenario that does not justify reopening of the final order.

In each of its three motions the operator states that its "representative told the respondent that a telephone call verifying the operator [sic] intention to contest was not returned. Therefore, he did not file the case." This statement could have two different meanings, both equally non-meritorious as a justification for the failure to contest the proposed assessments. The first possibility is that on three separate occasions (after receipt of the proposed assessment issued on January 10, 2008, after receipt of the proposed assessment issued on February 7, 2008,

and then again after the proposed assessment issued on March 6, 2008) the representative told the operator that a telephone call regarding the contest was not returned and that therefore he did not contest the penalty. In other words, under this interpretation of the operator's claim, this remarkable chain of events occurred three separate times over a three month period.

The other possible interpretation is that the representative had only one conversation with the operator, stating that a contest was not made because an earlier phone call (or calls) was not returned. If this occurred after the initial assessment, then the operator continued to rely on this representative to contest the two subsequent assessments, knowing that he had not properly handled the first one, and knowing that if the operator failed to return the representative's phone call in the future, it took the risk that the representative would not file a timely penalty contest on the operator's behalf.[3] If this confession was made to the operator after the third penalty assessment, the first two had become final long before that conversation took place, but the representative had taken no steps to alert the operator to the communication problems between them that allegedly resulted in the untimely contests.[4]

Moreover, Extra Energy filed its motion to reopen approximately four to five-and-a-half months after it was sent separate delinquency notices. It has provided no explanation for this delay. However, the operator has the burden of establishing its entitlement to extraordinary relief. Delay in seeking that relief, if unexplained, has been a relevant consideration in denial of motions to reopen. *See Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009) (citing *Central Operating Co. v. Utility Workers of America*, 491 F.2d 245, 253 (4th Cir. 1974) (finding "inexcusable dereliction" and denying motions to vacate when defendants waited almost four months after receiving notice of default judgments) and *McLawhorn v. John W. Daniel & Co.*, 924 F.2d 535, 538 (4th Cir. 1991) (finding that unexplained delay of three-and-half months was not reasonable)).

In sum, the operator's sole excuse for not filing timely notices of contest is that its representative was instructed to file the contests and failed to do so in each case, allegedly only because a telephone call (or calls) was not returned.[5] Consequently, we deny Extra Energy's

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[3] As the Federal Circuit suggested in its decision affirming a Merit Systems Protection Board ruling not to waive the time limit for filing an appeal, when the attorney did not receive a timely reply from his client providing information needed for the appeal, "all he had to do was make a telephone call to [the client]." *Phillips v. U.S. Postal Service*, 695 F.2d 1389, 1391 (Fed. Cir. 1982).

[4] In addition, Extra's motion provides no explanation as to how one of the assessments was inadvertently paid.

[5] Accordingly, we conclude that a dismissal without prejudice is not justified here. In our view, this motion does not fail due to lack of detail or documentation. It fails because the excuse presented simply does not demonstrate the level of care needed to justify reopening. *Cf. Atlanta Sand*, 30 FMSHRC at 608 (denying relief without prejudice because operator provided

request to reopen. *See Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062-63 (Dec. 2008) (denying relief because operator's excuse was insufficient); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067-68 (Dec. 2008) (same).

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Mary Lu Jordan, Commissioner

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Robert F. Cohen, Jr., Commissioner

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no specific facts justifying relief, but noting that "Rule 60(b) was not intended as a license for parties to fail to exercise due diligence in regard to litigation").

Chairman Duffy and Commissioner Young:

While we do not disagree with our colleagues that the excuse presented by the operator for its failure to timely contest the three proposed penalty assessments issued by MSHA is insufficient to establish that reopening of the assessments is warranted in this instance, and would accordingly deny the requests, we would not go so far as to specify that the denial was with prejudice. The Commission has, almost consistently, denied a vaguely explained and supported request to reopen without prejudice to the operator renewing its request to reopen with greater specificity and support for the request. *See, e.g.*, *Solar Coal Co.*, 30 FMSHRC 1049, 1050-51 (Dec. 2008); *S&M Coal Co.*, 30 FMSHRC 1053, 1055 (Dec. 2008); *Freeman Rock, Inc.*, 31 FMSHRC 91, 93 (Feb. 2009); *Mt. View Res.*, slip op. at 3, 31 FMSHRC __, Docket No. WEVA 2008-1853 (Mar. 12, 2009); *XMV, Inc.*, slip op. at 3, 31 FMSHRC __, Docket No. WEVA 2009-47 (Mar. 18, 2009). Further, in such cases we have also permitted an operator to explain why it delayed in filing for reopening for a number of months even after have been alerted to the delinquency by a notice from MSHA. *See, e.g., Pinnacle Mining Co.*, 30 FMSHRC 1071, 1074 (Dec. 2008); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009).

In light of these cases we would accord the operator in this instance the same leniency and deny the motion to reopen without prejudice to allow the operator an opportunity to refile its request with a more thorough explanation for its failure to timely contest the proposed penalties and to timely respond to the delinquency notices.[6]

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Michael F. Duffy, Chairman

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Michael G. Young, Commissioner

[6] The operator, of course, is free to file a motion for reconsideration of this decision pursuant to Commission Procedural Rule 78(a). *See* 29 C.F.R. § 2700.78(a).

Distribution:

James F. Bowman
Extra Energy, Inc.
P.O. Box 99
Midway, WV 26878

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Douglas N. White, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021