

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December 14, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2009-511
v.	:	A.C. No. 46-07009-161679
	:	
ELK RUN COAL COMPANY	:	
	:	

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

ORDER

BY: Jordan, Chairman; Duffy, Young, 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 December 19, 2008, the Commission received from Elk Run Coal Company (“Elk Run”) a motion 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).

Affidavits submitted by Elk Run stated that the operator intended to contest the proposed penalty assessment and faxed it to counsel. However, the fax allegedly never was received by counsel. When the operator realized that the fax had not been received, it promptly sought reopening.

The Secretary states that she does not oppose the reopening of the proposed penalty assessment. However, as our dissenting colleague and the Secretary note, this case represents the fourth time that Elk Run has filed a request to reopen since July 2007. The Secretary urges that Elk Run take whatever additional steps are necessary to ensure that future contests are filed in a timely manner.¹

Having reviewed Elk Run's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Patrick K. Nakamura, Commissioner

¹ While the facts of the prior cases are significantly different, in light of this history of motions to reopen, the Commission will employ greater scrutiny in considering whether to grant any requests to reopen filed by Elk Run after the date of this order. *See Elk Run Coal Co.*, 32 FMSHRC _____, No. WEVA 2009-1738 (Dec. 10, 2010).

Commissioner Cohen, dissenting:

I cannot agree with my colleagues' determination that Elk Run has established inadvertence or excusable neglect so as to justify reopening the assessment in this case. Elk Run attributes the failure to file its notice of contest to the fact that the Safety Director had "only recently" been transferred to that position and "was in the process of learning her job duties." Mot. at 1-2. The Safety Director attempted to fax the proposed assessment to counsel so that a notice of contest could be filed, but the fax did not go through "due to the large volume of documents being faxed." *Id.* at 2. As Elk Run acknowledges, "[the Safety Director] did not check to make sure that the fax was accepted and a confirmation received." *Id.* The penalties which Elk Run intended to contest total \$75,394. *Id.* at Ex. 1.

In view of Elk Run's history of failing to file timely contests of proposed assessments,¹ I view the Safety Director's failure to successfully fax the proposed assessment to counsel (and, more importantly, the failure to check on whether the fax had gone through) not as an isolated instance of inadvertence but as the result of an inadequate and unreliable internal processing system, which does not justify reopening. *Pinnacle Mining Co.*, 30 FMSHRC 1061 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155 (Sept. 2010); see *Gibbs v. Air Canada*, 810 F.2d 1529, 1537-38 (11th Cir. 1987) (District Court did not abuse its discretion for denying Rule 60(b) motion on the grounds that the movant failed to establish minimum procedural safeguards that would have avoided default). Not to check a fax confirmation cannot be justified by relative inexperience, and the fact of a "large volume of documents being faxed" demonstrates the need for greater attention rather than being an excuse for failure, especially given the large amount of money at stake.

Robert F. Cohen, Jr., Commissioner

¹ This is the fourth time that Elk Run filed a request to reopen within an 18 month period. In at least three of these four instances, including this case, the failure was due to an avoidable mistake on its part. Moreover, since this motion was filed, Elk Run filed another motion to reopen an assessment which had become final because of an avoidable mistake. See *Elk Run Coal Co.*, 29 FMSHRC 613 (Aug. 2007); *Elk Run Coal Co.*, 30 FMSHRC 423 (June 2008); *Elk Run Coal Co.*, 32 FMSHRC _____, WEVA 2009-1738 (Dec. 10, 2010).

Distribution:

Max L. Corley, III, Esq.
Dinsmore & Shohl, LLP
P. O. Box 11887
900 Lee Street, Suite 600
Charleston, WV 25339

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

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