

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

February 18, 2010

SECRETARY OF LABOR,	:	Docket No. WEVA 2009-527
MINE SAFETY AND HEALTH	:	A.C. No. 46-08522-150745
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2009-528
	:	A.C. No. 46-08522-162132
	:	
	:	Docket No. WEVA 2009-529
v.	:	A.C. No. 46-08909-150748
	:	
	:	Docket No. WEVA 2009-530
	:	A.C. No. 46-08909-159267
	:	
WEST VIRGINIA MINE POWER, INC.	:	Docket No. WEVA 2009-531
	:	A.C. No. 46-08909-162134

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

ORDER

BY: Jordan, Chairman; Young 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 December 24, 2008, the Commission received from West Virginia Mine Power, Inc. (“WVMP”) a motion by counsel seeking to reopen five penalty assessments 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).

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2009-527, WEVA 2009-528, WEVA 2009-529, WEVA 2009-530, and WEVA 2009-531, all captioned *West Virginia Mine Power, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

WVMP explains that at the time the proposed penalty assessments were issued the mines were under new management and did not have an effective means of receiving and processing the assessment forms in a timely manner. It further claims that due to excusable neglect, inadvertence or mistake related to the new management and safety teams running the mines, it did not timely contest the proposed assessments it seeks to reopen. It contends that in November 2008, the Safety Director for the mines conferred with counsel to review the delinquent cases and decided to pay some of the delinquent cases and to reopen the five identified in its motion. In the affidavit attached to the motion, the Safety Director states that he has instituted a new system to better handle the assessment forms at the mines to prevent future delinquencies.

The Secretary opposes reopening the proposed penalty assessment, maintaining that WVMP has failed to establish the existence of “exceptional circumstances.” Specifically, the Secretary contends that WVMP’s “inadequate or unreliable internal procedures” do not justify reopening. She also notes that as of the time she filed her response, the operator had ignored the assessments it had received for the past 8.5 months and had a total of 88 outstanding assessments totaling \$97,670 for the two mines at issue.

Having reviewed WVMP's request and the Secretary's response, we deny the motion with prejudice. We have held that an inadequate or unreliable system for receiving and processing proposed assessments does not constitute inadvertence, mistake or excusable neglect so as to justify the reopening of an assessment which has become final under section 105(c) of the Mine Act. *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1061 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066 (Dec. 2008). The Secretary correctly points out that WVMP has conceded that it "did not have an effective means of receiving . . . and processing" assessments in a timely manner. Mot. at 1. Furthermore, the lack of such an effective system appears to have been a chronic and longstanding problem. WVMP did not respond to the Secretary's allegation that it has ignored 88 outstanding assessments for over 8 months, and we therefore accept the Secretary's representation as true and conclude that WVMP has failed to establish good cause for reopening the proposed penalty assessments.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Commissioner Duffy, dissenting:

WVMP's explanation that it failed to file timely contests due to "new mine management," without any further elaboration, does not provide the Commission with an adequate basis to justify reopening of the assessment. However, in such cases, our denials have usually been without prejudice. *See, e.g., Eastern Associated Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

My colleagues are rightly concerned that in this case a number of assessments, covering a large number of proposed penalties, were not properly processed. However, unlike they, I would not go so far as to deny the requests to reopen with prejudice, based on our treatment of other operators who have admitted to a "chronic and longstanding problem" in responding to penalty assessments. *See slip op.* at 3 (citing cases). In those cases, there was no claim that the operator had new management. Moreover, here the operator has already demonstrated an improvement in responding to assessments in 2009. *See West Virginia Mine Power, Inc.* 31 FMSHRC 600, 601 (June 2009) (granting motion to reopen where contest was filed one day late). Consequently, I cannot agree that the admission of inadequate procedures in the earlier motion to reopen justifies denial of that motion with prejudice.

Michael F. Duffy, Commissioner

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