

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December 17, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2009-688
ADMINISTRATION (MSHA)	:	A.C. No. 46-08693-164121
	:	
v.	:	
	:	Docket No. WEVA 2009-1037
HIGHLAND MINING COMPANY	:	A.C. No. 46-06558-169988
	:	

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

ORDER

BY: Duffy, Young, Cohen, and Nakamura, Commissioners

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On January 21 and March 25, 2009, the Commission received from Highland Mining Company (“Highland”) motions made by counsel to reopen, respectively, Proposed Assessment Nos. 000164121 and 000169888, each of which 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).

In the case of Proposed Assessment No. 000164121, Highland originally explained that it was signed for by the company receptionist but was subsequently lost within the operator's internal mail system and never delivered to that mine's safety director for processing. With respect to Proposed Assessment No. 000169988, Highland stated that the proposed penalty assessment was misplaced on the desk of the safety director for that mine, and that, as a result, Highland inadvertently failed to transmit the proposed penalty assessment to counsel for the filing of a contest. In both instances Highland moved to reopen soon after receiving a notice from the Department of Labor's Mine Safety and Health Administration ("MSHA") stating that payment on the proposed assessment was delinquent. The Secretary did not oppose either of the requests to reopen.¹

In *Highland Mining Co.*, 31 FMSHRC 1313, 1316 (Nov. 2009), a consolidated order that also addressed other Highland motions to reopen, a majority of the Commission denied Highland's requests to reopen Proposed Assessment Nos. 000164121 and 000169988 without prejudice. The Commission stated that should Highland renew its request to reopen, it would need to "fully explain the circumstances" of its failure to timely contest the assessments at issue, and what steps it has taken to ensure both that it does not misplace assessments in the future and that it responds to them in a more timely manner. *Id.*

Highland has now filed renewed motions to reopen the two assessments. With regard to Proposed Assessment No. 000164121, it again states that the proposed assessment was lost in transit between a secretary for Highland and its safety director for the mine. Highland notes that no other persons have knowledge of what happened. In the case of Proposed Assessment No. 000169988, the safety director for that mine received the assessment and marked which penalties Highland intended to contest, but failed to forward it to the operator's counsel to submit

¹ We consider the Secretary's position in light of the provisions of the Informal Agreement between Dinsmore & Shohl Attorneys and Department of Labor – MSHA – Attorneys Regarding Matters Involving Massey Energy Company Subsidiaries" dated September 13, 2006. That agreement was in effect when the Secretary filed her responses. Therein, the Secretary agreed not to object to any motion to reopen a matter in which any Massey Energy subsidiary failed to timely return MSHA Form 1000-179 or inadvertently paid a penalty it intended to contest so long as the motion to reopen is filed within a reasonable time. Thus, we assume that the Secretary was not considering the substantive merits of a motion to reopen from any Massey Energy subsidiary so long as the motion was filed within a reasonable time. Such agreements obviously are not binding on the Commission, and the Secretary's position in conformance with the agreement in this case has no bearing on our determination on the merits of the operator's proffered excuse. The Commission has been informed that, since the time the Secretary filed her responses, she has rescinded the agreement.

to MSHA. The safety director's affidavit explains in detail what other duties and obligations prevented him from acting on the assessment.

Highland also states that, starting in June 2009, before the issuance of the Commission's order, it began to coordinate its response to proposed assessments with its parent company, Massey, so as to better keep track of assessments. Since then, the process has been further centralized, with MSHA mailing all assessment forms issued to Massey subsidiaries directly to Massey, which then consults with the subsidiary in responding to the assessment.

Having reviewed Highland's renewed requests to reopen, in the interests of justice, we hereby reopen these matters and remand them 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 petitions for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

Chairman Jordan, dissenting:

In my dissent from the prior Commission order in this case, I stated that I would deny the motions at issue with prejudice. I concluded that “indifference, as opposed to inadvertence, would appear to more accurately describe the underlying reason for Highland’s pattern of untimely contests.” *Highland Mining Co.*, 31 FMSHRC 1313, 1318 (Nov. 2009). Highland’s renewed motions to reopen fail to provide a sufficient rationale for revising this determination. Accordingly, I conclude that relief is not warranted and would deny the renewed motions with prejudice.

Mary Lu Jordan, Chairman

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