FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 17, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2009-689
v.	:	A.C. No. 46-08693-167069
HIGHLAND MINING COMPANY	:	

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

ORDER

BY: Jordan, Chairman; Young, Cohen, 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 January 21, 2009, the Commission received from Highland Mining Company ("Highland") a motion made by counsel 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).

Highland's original request stated that the proposed penalty assessment, No. 000167069, was misplaced on the desk of the operator's safety director, and that, as a result, Highland inadvertently failed to transmit the proposed penalty assessment to counsel for the filing of a contest. The operator further stated that, after discovering the mistake, it immediately transmitted the matter to counsel, who submitted the contest to the Department of Labor's Mine Safety and Health Administration ("MSHA") that same day. After MSHA rejected the submission as untimely, the operator filed its motion to reopen. The Secretary stated that she did not oppose the reopening of the proposed penalty assessment.[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 request to reopen Proposed Assessment No. 000167069 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 timely manner. *Id*.

Highland has filed a renewed motion to reopen Proposed Assessment No. 000167069. Its safety director explains that he received the assessment and marked those penalties Highland intended to contest, but the interruption of other job duties led to the form remaining on his desk. The safety director further states that, over time, the form got intermingled with other documents, and consequently was not forwarded in a timely manner to operator's counsel, as it otherwise would have been.

Highland also states that, starting in June 2009, it began to coordinate its response to proposed assessments with its parent company, Massey, so as to better keep track of assessments.

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[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 response. 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 response, she has rescinded the agreement.

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.

With regard to Proposed Assessment No. 000167069, we find Highland's explanation for why it did not respond in a timely manner to be insufficient, especially in light of our previous order. The safety director's excuse that other job duties interrupted him from forwarding the assessment on a timely basis cannot be accepted without further details regarding what those duties were, whether those duties were extraordinary, and the amount of time devoted to those duties. Consequently, we again deny Highland's request, this time with prejudice.

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Mary Lu Jordan, Chairman

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

Commissioner Duffy, dissenting:

While the explanation Highland provided in its renewed motion for why it was delinquent in responding to the proposed penalty assessment was not as detailed as it could have been, the renewed motion explains how Highland had begun to improve its assessment response procedures even before we issued our earlier order denying its motion to reopen. Moreover, Highland has not moved to reopen a default in over 20 months. Consequently, I would deem Highland's renewed motion as sufficiently responsive to our earlier order, and grant its request to reopen.[1]

Michael F. Duffy, Commissioner

[1] My colleagues' reference to a now-defunct agreement between the Solicitor of Labor and counsel for the operator may not be relevant here. *See supra*, at 2 n.1. While that general agreement not to oppose certain motions to reopen did not allow one to determine whether the Secretary's non-opposition was substantive or not, the Secretary ultimately rescinded that agreement in May of 2009, six months prior to our initial denial of Highland's request to reopen and ten months before this renewed motion was filed. The Secretary did not respond to the renewed motion, so one could just as easily presume that her prior notice of non-opposition was a substantive rather than a pro forma position.

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