FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 9, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	: :	Docket No. WEVA 2010-1423 A.C. No. 46-09221-188695
MAMMOTH COAL COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 19, 2010, the Commission received from Mammoth Coal Company ("Mammoth") a motion by its counsel 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).

On June 18, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000188695 to Mammoth. Mammoth, through its counsel, contends that it had implemented a new procedure for handling and filing proposed assessment forms, bringing the entire process in-house in early to mid June 2009, around the time that it received the assessment in this case. The operator states that under the new procedure, Mammoth's safety director would review the assessment form, mark the violations the company intended to contest, and scan and email the form to the corporate legal department, which would then prepare and file the form. The operator asserts that the safety director believes, based on his hand-written notes on the assessment form, that he timely received and forwarded the form to the legal department on July 7, 2009. The operator further states that the safety director has no record of the email sent because his old emails were lost when an updated computer program was installed on his computer. The operator notes that it timely contested three of the orders contained in the proposed assessment, and that the contests were docketed and stayed (Docket Nos. WEVA 2009-1482-R through 1484-R). The operator contends that it was not aware of the delinquency until it received the judge's order to show cause in those contest proceedings, which was issued on June 30, 2010. Upon receipt of the judge's order, the operator asserts that the safety director discovered that the legal department had no record of receiving the proposed assessment. The operator contends that it did not receive a delinquency notice from MSHA in this case. The operator surmises that "[e]ither [the safety director] sent the form to the legal department and it did not receive it or it was misplaced or [the safety director] mistakenly believed he had sent the form to the legal department but had not actually done so." Mot. at 4. The operator argues that it intended to contest the proposed assessment for 12 of the violations contained on the assessment form, but failed to do so due to inadvertence.

The Secretary opposes the motion on the basis that the operator's internal procedures were inadequate and unreliable and do not constitute an adequate excuse under Rule 60(b). She also states that the operator's conclusory and speculative statements regarding what occurred in this case are insufficient to warrant reopening. She notes that the operator received the assessment on June 25, 2009, that the assessment became a final order on July 25, 2009 and that a delinquency notice was sent on September 10, 2009. She also notes that this delinquent assessment appeared on subsequent assessments issued to the operator. While the operator claims that denial of reopening this assessment would result in severe consequences due to the operator's potential designation for a pattern of violations, the Secretary argues that this should have put the operator on heightened alert and that the operator should have been more vigilant. She also notes that the operator submitted its request just 17 days shy of one year without explanation for the delay.

Given the significant delay in seeking reopening and the inadequacy of the operator's explanation for its failure to timely submit its contest here, we cannot conclude that the operator's actions amount to mistake or inadvertence warranting relief. Mammoth provided no explanation for its failure to discover the delinquency here despite numerous opportunities. This delinquency appeared as an "outstanding balance" on six subsequent proposed assessments issued to Mammoth. Mammoth's argument about the severe consequences of the finality of the

assessment is undercut by its failure to exercise reasonable diligence. Mammoth should have been carefully monitoring its assessments and expecting the proposed assessment at issue here given the pending contest proceedings of the underlying orders. Under the circumstances, we conclude that Mammoth's delay in filing a request to reopen for nearly one year after the assessment became final was too long.

Based on the foregoing, we conclude that Mammoth has failed to provide an adequate basis for the Commission to reopen the penalty assessment. *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). Accordingly, we deny Mammoth's request to reopen.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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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

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