FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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January 31, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2010-1977
v.	:	A.C. No. 46-09209-222128
FRASURE CREEK MINING, LLC	:	

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 September 27, 2010, the Commission received from Frasure Creek Mining, LLC, a motion requesting that the Commission 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). On November 2, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, 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.

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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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Patrick K. Nakamura, Commissioner

Commissioner Cohen, dissenting:

I cannot agree with my colleagues' determination that the motion filed by Frasure Creek Mining is sufficient to reopen a penalty assessment that has become final under Section 105(a) of the Mine Act..

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established inadvertence, mistake or excusable neglect so as to justify reopening a final assessment. *Pinnacle Mining Co*., 30 FMSHRC 1061,1062 (Dec. 2008); *Pinnacle Mining Co.,* 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *see Gibbs v. Air Canada*, 810 F 2d 1529, 1537-38 (11th Cir. 1987). In particular, in *Elk Run Coal Co.*, 32 FMSHRC 1587, 1588-89 (Dec. 2010), the Commission recently held that the failure to open and deal with incoming mail does not constitute inadvertence or excusable neglect.

MSHA sent a penalty assessment on June 9, 2010 to "Frasure Creek Mining, LLC, Attn.: J.R. King - Superintendent" at the street address on Teays Valley Road in Scott Depot, West Virginia which the operator had provided to MSHA. The Secretary points out that the assessment was delivered by Federal Express and signed for on June 16, 2010. The motion contains an affidavit from Tony Grbac, Vice President for Safety, in which he asserts that Mr. King does not work regularly at the Teays Valley Road office, and that the assessment was not timely forwarded to Mr. King. Mr. Grbac also asserts that when the assessment was received by Mr. King, he "immediately" sent it to Mr. Grbac, who decided which citations to pay and which to contest. It appears that this was done on August 25, 2010. Counsel sent a letter to MSHA seeking to contest some of the citations on August 26, 2010. Thus, one must conclude that the assessment was held by the operator for two months before it was forwarded to Mr. King.

The operator failed to provide adequate facts to explain its failure to timely contest the assessment. Although Mr. King does not "regularly" work in the Teays Valley office, the motion does not explain when he works there and when he doesn't, the procedure for providing Mr. King with mail when he is not in this office, and why it took 60 days for Mr. King to receive this FedEx package.

In the absence of such explanation, I conclude that Frasure Creek's failure to timely contest the proposed assessment was the result of an unreliable or inadequate internal office procedure and, accordingly, that good cause has not been shown for reopening the penalty assessment.

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Robert F. Cohen, Jr., Commissioner

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