

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 15, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2011-559
ADMINISTRATION (MSHA)	:	A.C. No. 46-09136-218772
	:	
v.	:	Docket No. WEVA 2011-561
	:	A.C. No. 46-09136-221821
BIG RIVER MINING, LLC	:	
	:	Docket No. WEVA 2011-562
	:	A.C. No. 46-09136-225134
	:	

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 13, and December 14, 2010, Big River Mining, LLC, (“Big River”) filed motions requesting that the Commission reopen 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).

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

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate the proceedings in Docket Nos. WEVA 2011-559, WEVA 2011-561 and WEVA 2011-562, each captioned *Big River Mining, LLC* and involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

These three proceedings concern a total of 147 enforcement actions issued by the Mine Safety and Health Administration (“MSHA”) and total proposed penalties of \$281,919. Big River alleges that it was unable to timely file the contest forms associated with each proposed assessment due to an unforeseen mistake, inadvertence or excusable neglect. First, the operator states that it has no record of receiving the proposed assessments. Second, Big River contends that each final order should be reopened because the assessments, even if received, did not reach the Broad Run mine’s superintendent or safety director.

On January 14, 2011, the Secretary of Labor (“Secretary”) responded that she opposes each of the motions to reopen. She included the Federal Express “Detailed Results,” which demonstrated that the proposed assessments were delivered to the mine, as an exhibit to each response.

The three proposed assessment were signed for at the mine, upon their delivery. A different person signed for each delivery. Proposed Assessment No. 000218772 was issued on May 4, 2010, and assessed a penalty of \$160,864 for 39 enforcement actions. The Secretary represents that it was delivered to the mine on May 12, and became a final order on June 11. Proposed Assessment No. 000221821 was issued on June 8, 2010, and assessed a penalty of \$74,693 for 82 enforcement actions. The Secretary represents that it was delivered to the mine on June 15, and became a final order on July 23. Proposed Assessment No. 000225134 was issued on July 6, 2010, and assessed a penalty of \$46,362 for 26 enforcement actions. The Secretary represents that it was delivered to the mine on July 12, and became a final order on August 11.

Big River did not reply to the Secretary’s response, despite the Secretary’s inclusion of the Federal Express “Detailed Results.” We construe the operator’s failure to reply and address the delivery confirmations as a tacit confirmation that the proposed assessments were received. Therefore, we instead consider the merits of the operator’s alternative assertion – that a change in the mine’s operating status and reductions in staff prevented the mine’s superintendent and safety director from receiving the proposed assessments.

In its motion to reopen, Big River outlines a series of changes which occurred at the mine during the spring of 2010, and asserts that these changes contributed to its failure to timely file the contest forms. Big River states that on March 23, 2010, a new safety director began at the mine and shortly thereafter on April 9, 2010, the mine became a non-producing facility. The

operator also states that over the course of the next two months the number of staff at the mine decreased from over 100 employees to fewer than 10 employees. Furthermore, Big River states that around this time both the superintendent and safety director assumed “expanded roles” at a separate Big River facility.

Chad Carte, the human resource manager, described the mail receipt and distribution process at the mine in an affidavit. BR Ex. 2. He stated that all deliveries at Big River were made to the administrative office, where mail was sorted and placed into the internal mailboxes for the individual addressee. If an item of mail was identified as a safety related matter, standard procedure was to submit that item to the safety director, regardless of the addressee. Although the safety director and superintendent had “expanded roles” at another facility, their mail was regularly placed in their respective internal mailbox, and periodically picked up for their review.

Carte states that he began opening all mail sent to the mine’s address in September 2010, “in light of the continuing non-producing status of the mine, to direct correspondence to the most appropriate office for handling.” *Id.* On or about September 13, Carte opened a notice of delinquency issued by MSHA on September 7 for Case No. 000221821. Carte forwarded this delinquency notice to Barbara Willis, manager of accounts payable, who received it on or about September 16, 2010. On or about November 1, Carte opened a notice of delinquency issued by MSHA on October 26, for Case No. 000225134. Carte forwarded this notice to Willis, who received it on or about November 5. On or about December 1, Carte opened a notice of deficiency issued by the Department of the Treasury on November 27, for Case No. 000218772.² Carte forwarded this notice to Willis, who received it on or about December 4.

Willis states that she internally investigated the delinquent penalties, but “turned up no evidence that the proposed assessment[s] [were] received or returned by the superintendent, safety director, or any personnel at the mine”. BR Ex. 4. On December 9, Big River contacted outside counsel. Outside counsel filed the three subject motions to reopen.

The Secretary responds, in part, that the operator’s inadequate office procedures are not a sufficient basis for reopening the penalty assessments. Additionally she notes that the operator failed to explain the seven month delay between receiving Assessment No. 000218772, and more than four month delay between MSHA’s issuance of the delinquency notice, and its request to reopen. Nor did the operator explain the six month delay between receiving Assessment No. 000221821, and three month delay between MSHA’s issuance of the delinquency notice, and its request to reopen.

² The Department of Treasury’s delinquency notice was not the first delinquency notice issued to Big River for Case No. 000218772. Included with the Secretary’s response was a notice of delinquency issued by MSHA on July 29, 2010, for this case. Big River made no mention of this correspondence in its motion to reopen.

The record indicates that the operator received and signed for the proposed assessments. It is unclear what became of the assessments after receipt, but their resulting failure to reach either the superintendent or safety director makes it obvious that the assessments were not handled in a diligent manner. It is inconsequential, for the purposes of reopening a final order, that the mine was idled and was operating with a reduced staff. The Commission has held that the idling of a mine does not relieve an operator of its obligation to open and deal with the mail it receives. *Elk Run Coal Co.*, 32 FMSHRC 1587, 1588 (Dec. 2010).

The record also indicates that the operator did not have a reliable internal procedure for receiving and distributing mail at the time the proposed assessments were received. A failure to contest a proposed assessment that results from an inadequate or unreliable internal processing system is not grounds for reopening the assessment. *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008).

In addition, the operator failed to explain why it delayed in responding to MSHA's issuance of a delinquency notice for more than four months (000218772), three months (000221821), and more than one month (000225134).³ Having reviewed Big River's motions to reopen, and the Secretary's responses, we agree that the operator has failed to provide a sufficient basis for the Commission to reopen the penalty assessments.

³ In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of the notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is ground for the Commission to deny the motion).

The Secretary's response raised the issue, and Big River did not file a reply providing an explanation. We encourage parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary's response. *Highland*, 31 FMSHRC at 1316 n.3 (citation omitted). "Accordingly, where the Secretary raises the issue of the delay between receipt of a delinquency letter and the filing of the request to reopen, an operator who does not explain why, after it was informed of a delinquency, it took as long as it did to request reopening, does so at its peril." *Id.*

For the reasons stated herein, we conclude that these motions have failed to make a showing of circumstances that warrant reopening of the penalty assessments. Accordingly, the motions are denied.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

Curtis R. A. Capehart, 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

Melanie Garris
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