FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

November 30, 2009

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2009-135-M
v.	:	A.C. No. 30-03138-179105
WINGDALE MATERIALS, LLC	:	

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

ORDER

BY: Jordan, Chairman; Young and Cohen, 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 June 16, 2009, the Commission received a motion by counsel to reopen a penalty assessment issued to Wingdale Materials, LLC ("Wingdale") 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).

Wingdale states that it received Proposed Assessment No. 000179105 from the Department of Labor's Mine Safety and Health Administration ("MSHA") on March 18, 2009. In an affidavit, Wingdale's safety director explains that he was away at the time and did not personally receive the assessment until March 30. He subsequently was also away from the mine on travel the first week of April, and states that he neglected to act upon the assessment immediately after he returned. He mailed the contest form, indicating Wingdale's intent to contest penalties associated with seven citations, six days too late. Soon after, the operator paid the other proposed penalties.

The Secretary of Labor opposes Wingdale's request to reopen the proposed assessment. She characterizes Wingdale's procedures for responding to assessments as inadequate, and argues that inadequate or unreliable internal office procedures do not constitute the exceptional circumstances required for reopening.

Having reviewed Wingdale's request to reopen and the Secretary's response, we conclude that Wingdale has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. The safety director's generalized excuse that he did not receive the assessment until March 30, 2009, due to his "travel and work schedule" is not sufficient to warrant relief. Moreover, he admittedly received the assessment on or about March 30, 2009. He thus became personally aware of the assessment well before the April 17 deadline for contesting it, but offers only the excuse that he was traveling on business during the first week of April. This fails to explain why he did not contest the penalty prior to the deadline, during the period in April when he was not traveling.

Wingdale's submission does not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny without prejudice Wingdale's request.[1] *See e.g., Eastern Associated Coal, LLC,* 30 FMSHRC 392, 394 (May 2008). If Wingdale submits another request to reopen the case, it should explain with specificity why the safety director's work and travel schedule between March 18 and March 30 precluded action on the assessment, and why he did not contest it after the end of the first week in April when he returned from his travel.

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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

[1] Our dissenting colleague lists ten recent cases in which we have granted reopening after MSHA's proposed assessments have become final under section 105(a) because of the failure by operators to timely contest the proposed assessment. Our colleague claims that the information provided by the operators in most, if not all, of these cases was "much less detailed" than the information submitted by Wingdale here. Slip op. at 4. We respectfully disagree, and find the cases to be distinguishable on various grounds. *See, e.g., J & T Servs*., 31 FMSHRC 118 (Feb.2009) (person responsible for filing contest form was killed in accident shortly after receiving proposed assessment, and contest was filed two days late). As our colleague acknowledges, in none of these ten cases did the Secretary oppose reopening.

By contrast, in the present case, there are periods of time during which Wingdale's failure to act is unexplained. Consequently, we are not denying Wingdale's motion outright, but requiring it to fully explain why the proposed assessment was not contested timely.

Commissioner Duffy, dissenting:

I would not deny the operator's request to reopen but would instead grant reopening. While the majority's denial is without prejudice, and thus leaves the door open for the operator to file another request to reopen, I am not sure what would be gained by requiring its safety director to account for his comings and goings during March and April of this year. The motion in this case presented an honest admission by the safety director that he knew he was under a deadline to file a notice of contest but that travel away from the office on two occasions during the relevant period resulted in his failure to timely file. The contest was filed six days late.

I am mindful that mine safety and health enforcement has stepped up in intensity over the past several years and has resulted in a sharp increase in citations and orders issued. I am further mindful that this intensity has markedly increased the day-to-day responsibilities of all concerned. This Commission, for example, has seen its yearly caseload increase from a level of 2,437 new cases in FY 2005 to 9,240 new cases in FY 2009. MSHA has been authorized to hire hundreds of new inspectors to ensure that all mandated inspections of surface mines (twice annually) and all underground mines (four annually) are conducted. The duties of those charged with complying with the Mine Act and its standards are being stretched as well.

These circumstances do not absolve mine operators from promptly asserting their rights and carrying out their responsibilities in contesting citations and penalties under the Act's procedural requirements, and the Commission has recently been looking at requests to reopen with a more critical eye than in the past. We have gone so far as to institute a rulemaking in an attempt to set criteria and standards for determining when granting a request to reopen a proceeding is appropriate.

In the meantime, and given the circumstances outlined above, I find that a six-day delay in filing a penalty contest that is honestly admitted as having occurred due to press of business falls under excusable neglect. We have of late granted a number of requests to reopen where the notice of contest was submitted to MSHA just a few days late. Compared to the information provided in support of the request to reopen in this case, the information provided by the respective operator in most if not all of each of those other cases was much less detailed regarding what, specifically, prevented the operator from filing a notice of contest at any time during the 30-day period after the penalty assessment was received.[1]

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[1] *See, e.g., Ruscat Enterprises, Inc.*, 31 FMSHRC 112 (Feb. 2009); *Oak Grove Res., LLC,* 31 FMSHRC 115 (Feb. 2009); *J & T Servs.,* 31 FMSHRC 118 (Feb. 2009); *Clean Energy Mining Co.*, 31 FMSHRC 370 (Apr. 2009); *Lueders Limestone, LP*, 31 FMSHRC 386 (Apr. 2009); *Black Butte Coal Co.*, 31 FMSHRC 400 (Apr. 2009); *Mosaic Phosphates Co.*, 31 FMSHRC 504 (May 2009); *Alex Energy, Inc.*, 31 FMSHRC 540 (May 2009); *Dickenson-Russell Coal Co.*, 31 FMSHRC 587 (June 2009); *West Virginia Mine Power, Inc.*, 31 FMSHRC 600 (June 2009).

While it is true that in those cases the Secretary did not oppose reopening, she, like the majority, provides no explanation for treating this case differently, other than that the safety director appears to have admitted there were times during the 30-day contest period when he could have submitted the form. The Commission has never required a detailed accounting of what prevented an operator from submitting a notice of contest throughout the 30 days in which it had to respond to an assessment, and no reason for the Commission to do so has been advanced in this case.

Consequently, I cannot agree with the majority that relief in this instance should be contingent upon the operator's submission of a greater amount of information than it has already submitted. In additional, I am doubtful that the safety director can say much more than he did when the request to reopen was filed over five months ago.

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Michael F. Duffy, Commissioner

Distribution:

Mark N. Savit, Esq.
Patton Boggs LLP
1801 California Street, Suite 4900
Denver, CO 80202

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