FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 17, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2008-273
	:	A.C. No. 46-09030-120039
v.	:	
	:	
PINNACLE MINING COMPANY, LLC	:	

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

ORDER

BY: Jordan, Young, and Cohen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On November 26, 2007, the Commission received from Pinnacle Mining Company, LLC ("Pinnacle") 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).

In February 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued two citations to Pinnacle. MSHA later issued Proposed Assessment No. 000120039, which proposed penalties for those citations. Mot. at 1. Pinnacle states that in September 2007, MSHA sent a letter stating that the corresponding civil penalties had become delinquent. Aff. of James Bennett at 1. It asks us to reopen the penalty assessment that had become a final order of the Commission, stating that it failed to timely respond to the assessment notice because it had not established a reliable mail delivery system. Mot. at 1-3. In particular, Pinnacle's safety director acknowledges that at the time, the mail was picked up from the Post Office infrequently and by different individuals, and that it was not always delivered to the correct office or individual in time to respond in a timely manner. Aff. of James Bennett at 2.

He notes that the post office box used by the mine was located 12 to 16 miles from the mine site. *Id*. The Secretary, while not opposing the request to reopen, notes that both the penalty assessment and delinquency letter were sent to the mine address of record. Letter from W. Christian Schumann (Dec. 17, 2007).

We have held 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 inadvertence or mistake. *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).

We conclude that relief is not warranted in this case. Although a party may be entitled to relief from a final order on the basis of inadvertence or mistake, neither are apparent here. Rather, even if the operator's assertions are accepted as true, they demonstrate only that it had tolerated a mail delivery system that clearly had the potential to cause haphazard and untimely receipt of important mail.[1] Consequently, we find that the excuse proffered is a hollow one. Indeed, after receiving two citations, the operator should have realized that inevitably a subsequent time-sensitive penalty assessment would arrive in the mail. Nonetheless, it failed to create a mechanism to ensure that it would routinely and effectively receive mail when it was delivered. Relief should not be granted in such a case. *See Gibbs v. Air Canada*, 810 F.2d 1529, 1537-38 (11th Cir. 1987) (holding that default caused by failure to establish minimum procedural safeguards for determining that action in response to summons and complaint was taken does not constitute default through excusable neglect).

The Commission has recognized that Rule 60(b) "'is a tool which . . . courts are to use sparingly . . . .'" *Atlanta Sand & Supply Co.*, 30 FMSHRC 605, 608 (July 2008) (citing *JWR*, 15 FMSHRC at 789). Relief under Rule 60(b) should generally not be accorded to an operator who creates and condones a system which predictably will result in missed deadlines.

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[1] Although in his affidavit, Bennett alleges that mail was sometimes delivered late, he does not claim that Pinnacle failed to receive its mail at all. Thus, assuming that the proposed assessment eventually was received, Pinnacle could have taken some action. However, there is nothing in the record to indicate that the operator responded in any manner to the penalty assessment for the February 2006 citations until it received the delinquency letter in September 2007. Shortly thereafter, in October 2007, it paid the assessment in full, according to the Secretary. Inexplicably, it then filed the pending motion to reopen the final order in November 2007.

Accordingly, we deny Pinnacle's motion.

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Chairman Duffy, dissenting:

Given that the Secretary does not oppose Pinnacle's request to reopen, I would normally remand this matter to the Chief Administrative Law Judge for a determination of whether relief should be granted. However, because the operator waited over two months after receiving the delinquency notice to request reopening, I would deny its request to reopen. I would specify that dismissal was without prejudice, so that Pinnacle could provide an explanation for the delay if it chose to renew its request to reopen.

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Michael F. Duffy, Chairman

Distribution

Justin A. Rubenstein, Esq.
Dinsmore & Shohl, LLP
215 Don Knotts Blvd., Suite 310
Morgantown, WV 26501

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. Department 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