

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

December 17, 2008

SECRETARY OF LABOR,	:	Docket No. WEVA 2008-927
MINE SAFETY AND HEALTH	:	A.C. No. 46-01816-122324
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2008-928
	:	A.C. No. 46-01816-133987
	:	
	:	Docket No. WEVA 2008-929
	:	A.C. No. 46-01816-125080
	:	
	:	Docket No. WEVA 2008-930
	:	A.C. No. 46-05868-125081
	:	
	:	Docket No. WEVA 2008-931
v.	:	A.C. No. 46-09030-122333
	:	
	:	Docket No. WEVA 2008-1360
	:	A.C. No. 46-01816-129390
	:	
	:	Docket No. WEVA 2008-1361
	:	A.C. No. 46-01816-131799
	:	
	:	Docket No. WEVA 2008-1362
	:	A.C. No. 46-09030-134000
	:	
	:	Docket No. WEVA 2008-1363
	:	A.C. No. 46-09030-140219
	:	
PINNACLE MINING COMPANY, LLC	:	Docket No. WEVA 2008-1364
	:	A.C. No. 46-09030-144941

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2000) (“Mine Act”). On April 15, 2008, the Commission received from Pinnacle Mining Company (“Pinnacle”) motions by counsel seeking to reopen five 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), Docket Nos. WEVA 2008-927, WEVA 2008-928, WEVA 2008-929, WEVA 2008-930, and WEVA 2008-931. On June 25, 2008, the Commission received from Pinnacle motions by counsel seeking to reopen five penalty assessments that had similarly become final orders of the Commission, Docket Nos. WEVA 2008-1360, WEVA 2008-1361, WEVA 2008-1362, WEVA 2008-1363, and WEVA 2008-1364.¹

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).

The Department of Labor's Mine Safety and Health Administration ("MSHA") issued the ten proposed penalty assessments to Pinnacle on July 17, 2007 (A.C. Nos. 122333 and 122324), on August 15, 2007 (A.C. Nos. 0125080 and 0125081), on October 17, 2007 (A.C. No. 129390), on November 14, 2007 (A.C. No. 131799), on December 12, 2007 (A.C. Nos 133987 and 134000), on February 13, 2008 (A.C. No. 140219), and on March 31, 2008 (A.C. No. 144941). In each proposed penalty assessment MSHA stated:

Pursuant to 30 [C.F.R. §] 100.7, you have 30 days from the receipt of this proposed assessment to either pay the penalty, or notify MSHA that you wish to contest the proposed assessment and that you request a hearing on the violations in question before the Federal Mine Safety and Health Review Commission. If you do not exercise the right herein described within 30 days of receipt of this proposed assessment, this proposed assessment will become a final order of the Commission and will be enforced under provisions of the Federal Mine Safety and Health Act of 1977.

On October 26, 2007, MSHA sent delinquency notices informing Pinnacle that it had not responded to penalty Assessment Case Nos. 122333 and 122324 in a timely manner and that payments were now due. On November 15, 2007, MSHA sent Pinnacle delinquency notices for Assessment Case Nos. 125080 and 125081. On January 9, 2008, MSHA sent a delinquency notice for Assessment Case No. 129390. On March 6, 2008, MSHA sent Pinnacle a delinquency notice for Assessment Case No. 133987. On April 24, 2008, MSHA sent Pinnacle delinquency notices for Assessment Case Nos. 131799 and 134000. On May 7, 2008, MSHA sent Pinnacle a delinquency notice for Assessment Case No. 140219.

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2008-927, WEVA 2008-928, WEVA 2008-929, WEVA 2008-930, WEVA 2008-931, WEVA 2008-1360, WEVA 2008-1361, WEVA 2008-1362, WEVA 2008-1363, and WEVA 2008-1364, all captioned *Pinnacle Mining Company* and involving similar procedural issues. 29 C.F.R. § 2700.12.

Pinnacle asserts that it failed to contest the penalty assessments within the required 30 days because its Safety Director, James Bennett, believed that the proposed penalties were already contested. In affidavits accompanying these 10 motions, which are virtually identical except for the case number references, Mr. Bennett states that as Safety Director, he is responsible for dealing with MSHA enforcement actions including the filing of civil penalty contests. Mr. Bennett also states in each affidavit that upon receiving notice that the various enforcement actions in each case “were not considered by MSHA to be in contest,” he “conducted an investigation and requested that the accompanying Motion to Reopen Civil Penalty Proceeding be filed.” In the affidavits accompanying Docket Nos. 2008-1360 through 2008-1364, Mr. Bennett also states that during the time the proposed assessments were issued, “Pinnacle was undergoing a management and ownership transfer.” Pinnacle asserts in all ten motions that it is entitled to the reopening of the penalty assessments contained in these final orders because of either “excusable neglect or perhaps a failure on MSHA’s part.”

In response, the Secretary states that the operator failed to adequately explain its failure to timely contest the proposed penalty assessment. The Secretary states that MSHA has no record that it ever received contests for any of the penalty assessments in question. She further asserts in Docket Nos. WEVA 2008-927 through WEVA 2008-931 that Pinnacle in its April 15, 2008, motions to reopen failed to explain why it did not seek reopening within a reasonable period of time when four of the five delinquency notices in this case were sent in October and November of 2007.² In Docket Nos. WEVA 2008-927 through WEVA 2008-931 Pinnacle filed a response to the Secretary’s pleadings which did not provide any additional facts for the Commission to consider.

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).

² In Docket Nos. WEVA 2008-927 through 2008-931, the Secretary also brought a motion to file her responses out of time, which was opposed by Pinnacle. Given that the Secretary’s delay was only one week and these dockets involve 175 violations which the Secretary needed to research, we grant the Secretary’s motion and accept her Opposition to Motion to Reopen Penalty Assessments.

Having reviewed Pinnacle's motion to reopen and the Secretary's response thereto, we agree with the Secretary that Pinnacle has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments. In these consolidated cases in ten dockets, Pinnacle requests that we reopen, by Pinnacle's count, 278 citations or orders with final penalty assessments totaling over \$264,000. Pinnacle's claims that it believed, erroneously, it had properly contested 10 sets of proposed assessments during a period of over nine months are conclusory, essentially identical, and do not provide the Commission an adequate basis to justify reopening. Pinnacle's further claims that, although it first was sent a delinquency notice in October 2007 and did not submit its first set of motions for reopening until April 2008, its Safety Director took prompt action to investigate and seek reopening of each delinquency upon learning of it, are similarly conclusory. Accordingly, we deny without prejudice Pinnacle's request. *See Eastern Assoc. Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

In light of the number of citations and orders at issue, the delay in seeking reopenings, and the absence of explanation in its motions, the Commission would expect Pinnacle to provide, in verified affidavits with relevant documents attached, detailed evidence of: (1) the circumstances supporting the claim that the Safety Manager believed that each of the proposed assessments had been properly contested; (2) what Pinnacle did after receiving the various notices of delinquency; and (3) the Safety Manager's investigations.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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