

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

JAN 1:2 2016

v.

APOGEE COAL COMPANY, LLC

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:
: Docket No. WEVA 2015-608
: A.C. No. 46-08939-338084
:
:

BEFORE: Young, Nakamura, and Althen, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On March 23, 2015, the Commission received from Apogee Coal Company, LLC (“Apogee”) a motion seeking 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).

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 orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *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

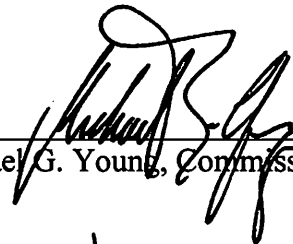
¹ This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on December 12, 2013, and became a final order of the Commission on January 13, 2014. Apogee asserts that it failed to timely contest the proposed assessment due to a clerical error. Apogee further asserts that it contested the underlying citation on May 22, 2013 and filed a motion to permit late filing of the contest to the proposed assessment on February 3, 2014. The Secretary opposes the request to reopen and notes that a delinquency notice was mailed to the operator on February 26, 2014, and the case was referred to the U.S. Department of Treasury for collection on June 19, 2014.

When reviewing an operator’s motion to reopen a proposed assessment, we consider whether the operator has contested the citation underlying the proposed assessment. As stated above, Apogee had contested the underlying citation. However, as we noted in *Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3347 (Nov. 2013), “[t]he challenging of a citation does not inevitably excuse the failure to contest the penalty.”

Rule 60(c) of the Federal Rules of Civil Procedure provides that a Rule 60(b) motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(c). This motion to reopen was filed more than one year after the final order. Therefore, under Rule 60(c), Apogee’s motion is untimely. *JS Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, we deny Apogee’s motion.



Michael G. Young, Commissioner



Patrick K. Nakamura, Commissioner



William I. Althen, Commissioner

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