FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 0 1 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 2014-632
	:	A.C. No. 46-08939-335027
APOGEE COAL COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, 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. (2012) ("Mine Act"). On March 5, 2014, 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 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 November 7, 2013, and became a final order of the Commission on December 9, 2013. MSHA records also indicate that Apogee received a delinquency notice dated January 23, 2014. The operator asserts that it failed to timely contest the proposed assessment due to a "clerical error," but does not provide any details as to the alleged error. The only justification offered is that the failure to timely file occurred as a "result of inadvertence or mistake." This assertion was made by Apogee's counsel, without any supporting affidavit or declaration by a person with direct knowledge of the alleged "inadvertence or mistake." Although the Secretary does not oppose the motion to reopen, he states that the operator did not file the motion to reopen until one month after it had received the delinquency notice. The operator does not offer any explanation for this delay.

We deny the operator's motion to reopen because the operator has failed to establish good cause to justify reopening. Specifically, we find relevant the absence of any explanation for the failure to contest the proposed assessment other than an unverified claim that it was the "result of inadvertence or mistake." This statement, by itself, is insufficient to constitute good cause for reopening. First, it lacks any description of the alleged "inadvertence or mistake." The phrase "inadvertence or mistake" is a legal conclusion which merely parrots grounds for granting relief from a final judgment, as contained in Rule 60(b)(1) of the Federal Rules of Civil Procedure. In order to consider a motion to reopen a proposed assessment by MSHA which has become a final order because of the operator's failure to timely contest the proposed assessment, the Commission must be informed of the facts and circumstances which constitute the alleged "inadvertence or mistake." *Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010); *see also*, *Eastern Assoc. Coal Co.*, 30 FMSHRC 392 (May 2008) (holding that operator's "conclusory statement that its failure to timely file was due to 'clerical error' does not provide the Commission with an adequate basis to justify reopening").

Second, the allegation of "inadvertence or mistake" is a statement by Apogee's counsel, who has no direct knowledge of the facts and circumstances. As the Commission noted in *Higgins Stone*, "[a]ffidavits from persons involved in and knowledgeable of the situation and pertinent documents should be included with the request to reopen." 32 FMSHRC at 34.

We also find relevant Apogee's failure to provide any explanation for why it took over 30 days to file the motion to reopen upon receiving the delinquency notice. *Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009) (finding relevant the amount of time that has passed between the operator's receipt of a delinquency notice and the operator's filing of its motion to reopen.); *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17.

Therefore, we deny the motion to reopen.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Robert F. Cohen Jr., Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

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