

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 20 2016

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

v.

KENTUCKY FUEL CORPORATION

:
:
: Docket No. KENT 2014-489
: A.C. No. 15-19475-345392
:
:

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 May 13, 2014, the Commission received from Kentucky Fuel Corporation (“Kentucky Fuel”) 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 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).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment of \$39,256 was delivered on March 19, 2014, and became a final order of the Commission on April 18, 2014. Kentucky Fuel asserted that it

failed to timely contest the proposed assessment due to a change in personnel responsible for handling MSHA matters. In this regard, the operator asserts that the new safety director who was responsible for handling MSHA matters was not familiar with the process for contesting proposed assessments.

The Secretary opposed the request to reopen, noting that the operator has an extensive prior history of delinquent payments of penalties. The Secretary argues that this record indicates that the operator has not acted in good faith.

In regards to good faith, it is well recognized in federal jurisprudence that the issue of whether the movant acted in good faith is an important factor in determining the existence of excusable neglect. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993); *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006). Likewise, the Commission has recognized that a movant's good faith, or lack thereof, is relevant to a determination of whether the movant has demonstrated mistake, inadvertence, surprise or excusable neglect within the meaning of Rule 60(b)(1) of the Federal Rules of Civil Procedure. *Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3346 (Nov. 2013); *M.M. Sundt Constr. Co.*, 8 FMSHRC 1269, 1271 (Sept. 1986); *Easton Constr. Co.*, 3 FMSHRC 314, 315 (Feb. 1981).

The Commission has also specifically addressed situations where an operator has failed to respond to an argument by the Secretary that the operator's extensive history of outstanding penalties demonstrates bad faith. The Commission has found that the operator's failure to respond to an allegation of bad faith by the Secretary may support a conclusion that the operator has not met its burden of establishing entitlement to extraordinary relief. *Oak Grove Res. LLC*, 33 FMSHRC 1130, 1132-1133 (June 2011).

Kentucky Fuel's history regarding the payment of penalties is abysmal. According to the Secretary's un rebutted Opposition to the Motion to Reopen, when the motion was filed, this mine had fifteen outstanding penalties totaling \$54,294 (not including the penalty assessment at issue here), and the operator had total outstanding penalties of \$351,696 for its thirteen active and inactive mines, spanning 140 cases from 2010-2014. The operator's record indicates that it has repeatedly disregarded final penalty assessments. As stated above, the Secretary argues that this delinquency record of the mine, and of the operator, in the years preceding the request to reopen, indicates that the operator has not acted in good faith. The operator failed to respond to this argument by the Secretary.


This case, in which the operator had a total delinquency of over \$350,000, bears similarities to *Oak Grove*, in which the operator had a total delinquency of more than \$750,000. Under *Oak Grove*, 33 FMSHRC at 1132-33, the operator has not met its burden of establishing good faith and an entitlement to extraordinary relief.

Here, the extremely large delinquency of the operator, which had accumulated in the years preceding the request to reopen, should have informed the operator of the need to be more attentive to proposed assessments from MSHA. We also note that this proposed assessment included thirteen orders under section 104(d) for unwarrantable failure to comply with

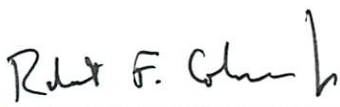
mandatory health or safety standards, and the proposed penalty for these orders was \$33,463 out of the total \$39,256 proposed assessment. Therefore, the operator should have taken precautions, due to the serious violations and high penalties at issue, to timely contest the proposed assessment.


Finally, the Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008). It is the operator's responsibility to properly train all personnel who handle proposed assessments. Each proposed assessment sets forth the deadline for contesting proposed assessments. Here, it appears from Kentucky Fuel's motion that the safety director was only trained after the fact – that is, he was told about procedures for contesting penalties only after the deadline for contesting the penalty assessments at issue had passed. Mot. at 1. Moreover, although he is identified in the motion as the operator's "new" safety director, the Secretary points out that he was the safety director at least two months prior to the date of the proposed penalties. See Sec's Opp. At 3-4. In addition, the operator argues unconvincingly that the fact that the safety director had an address different from that of the mine, along with the "change in personnel," should excuse the late filing. Mot. at 2. As the Secretary states, the assessment was delivered by certified mail to the safety director at the address of record shown on the legal identity report. Based on the above, we conclude that the operator's failure to contest the proposed assessment resulted from an inadequate or unreliable internal processing system.

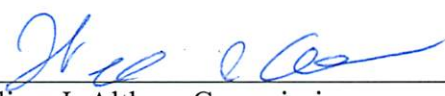
Accordingly, we find that the operator has failed to demonstrate an entitlement to extraordinary relief, and thus we deny Kentucky Fuel's motion.


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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