FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 15, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2011-1410
	:	A.C. No. 15-18360-102222
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	:	Docket No. KENT 2011-1411
	:	A.C. No. 15-18360-114577
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	:	Docket No. KENT 2011-1412
	:	A.C. No. 15-18360-136738
	:	
	:	Docket No. KENT 2011-1413
	:	A.C. No. 15-18360-092183
	:	
	:	Docket No. KENT 2011-1414
	:	A.C. No. 15-18360-086784
	:	
	:	Docket No. KENT 2011-1415
	:	A.C. No. 15-18360-097149
	:	
	:	Docket No. KENT 2011-1416
	:	A.C. No. 15-18360-124120
	:	
	:	Docket No. KENT 2011-1417
v.	:	A.C. No. 15-18360-121245
	:	
H&D MINING, INC.	:	

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

<u>ORDER</u>

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 19, 2011, the Commission received from H&D Mining, Inc. ("H&D") a motion made by counsel seeking to reopen eight 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).[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).

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).

The record indicates that the proposed assessments were delivered to the operator over a two-year period, from July 2006 through February 2008. H&D asserts that its failure to contest was due to the fact that the mine was in the process of being shut down. Moreover, H&D claims it was unfamiliar with the contest process since it never filed one before.

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[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2011-1410, KENT 2011-1411, KENT 2011-1412, KENT 2011-1413, KENT 2011-1414, KENT 2011-1415, KENT 2011-1416 and KENT 2011-1417, all captioned *H&D Mining, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

The Secretary has filed a motion for expedited consideration of this matter on September 9, 2011, along with her response to the motion to reopen.[2] The Secretary opposes the request to reopen because it was filed three to five years after the proposed assessments became final Commission orders. Moreover, the Secretary notes that H&D makes no showing of exceptional circumstances that warrant reopening. Specifically, there is no explanation as to when the shut-down process occurred or why it prevented the timely filing of contests over a two-year period. Furthermore, the Secretary notes that the courts have held that ignorance of the rules and the law is not a permissible ground for reopening under Rule 60(b)(1). In addition, the Secretary asserts that H&D did not respond to any of the delinquency notices dating from September 2006 through April 2008, and the assessments totaling $207,278 were forwarded to the U.S. Treasury Department for collection purposes. On April 1, 2011 the United States filed an action in federal district court to compel payment by the operator. Although this reopening request was explicitly invoked in the answer to the district court action, H&D makes no mention of the action in its reopening request to the Commission. Finally, the Secretary states that the operator's delinquency record, which shows that it has repeatedly disregarded final penalty assessments, indicates that it has not acted in good faith. Moreover, the fact that the operator waited until the United States sued it in district court to request reopening, and then omitted any mention of that action in its request, is the antithesis of good faith, and a strategy which the Secretary urges the Commission not to reward.

We have held that a Rule 60(b) motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. Here, the motion to reopen was filed three to five years after the proposed assessments became final Commission orders. Therefore, H&D's motion is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

Additionally, 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. *M.M. Sundt Constr. Co.,* 8 FMSHRC 1269, 1271 (Sept. 1986); *Easton Constr. Co.,* 3 FMSHRC 314, 315 (Feb. 1981). As pointed out by the Secretary, H&D's delinquency record and its strategy of waiting to file a request to reopen until it was sued for payment collection and then omitting any mention of that action in its request, demonstrates a lack of good faith militating against granting extraordinary relief in this case. *Oak Grove Res., LLC,* 33 FMSHRC ____, slip op. at 3-4, No. SE 2011-16 (June 7, 2011).

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[2] We hereby grant the Secretary's motion and have expedited our consideration.

Having reviewed H&D's request and the Secretary's response, we conclude that H&D has failed to establish good cause for reopening the proposed penalty assessments and deny its motion with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
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