

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 7, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. SE 2011-16
	:	A.C. No. 02-00851-221338
v.	:	
	:	
OAK GROVE RESOURCES LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) (“Mine Act”). On October 5, 2010, the Commission received from Oak Grove Resources LLC (“Oak Grove”) a motion made by counsel 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).

On June 3, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Penalty Assessment No. 000221338 to Oak Grove, proposing penalties of nearly \$125,000 for 80 citations and orders issued to the operator the previous April. In its motion to reopen the assessment so that it can contest 27 of the penalties proposed for a total of nearly \$111,000,¹ Oak Grove states that it failed to timely file a contest due to a miscommunication between its counsel and its safety director. Its safety director further states that the contest form was submitted in July to MSHA with Oak Grove's payment of the uncontested penalties, with both sent to MSHA's address for penalty payments, not to the separate address for contests.

The Secretary opposes the reopening of the proposed assessment on the ground that inadequate or unreliable internal procedures do not constitute an adequate excuse for reopening. She argues that the large amounts of the penalties involved indicate that the operator's internal procedures were particularly inadequate. She also states that payment for the uncontested penalties was by check dated October 7, 2010, that there was no contest form attached to the payment, and that the payment did not designate which penalties were being paid.

Since the time Oak Grove filed its motion and the Secretary her response, the Commission issued an order denying two other Oak Grove motions to reopen, including one which contained almost exactly the same excuse regarding a miscommunication between the safety director and counsel. We held that such an explanation provided insufficient grounds to reopen, and stated that if Oak Grove wished to renew its request to reopen with a detailed explanation of the circumstances, it should file its renewed or amended request within 30 days. *Oak Grove Res., LLC*, 32 FMSHRC 1253, 1254-55 (Oct. 2010).

The operator did not do so, but instead waited nearly three months, and then filed a renewed motion to reopen accompanied by a motion to permit late filing. In a separate order, the Commission is denying the motion to permit late filing and thus will not consider the renewed motion in that case.

We are also hereby denying, without prejudice, the motion to reopen the assessment in this case. We have held that an inadequate or unreliable internal processing system does not constitute inadvertence, mistake or excusable neglect so as to justify the reopening of an assessment which has become final under section 105(c) of the Mine Act. *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Elk Run Coal Co.*, 32 FMSHRC 1587, 1588 (Dec. 2010). Should Oak Grove renew its request to reopen this assessment, it must do so within 30 days, and fully explain the circumstances in its failure to timely contest the proposed assessment. It must

¹ Oak Grove's motion refers to Order No. 6690851 and Citation No. 8518607 twice each when listing the penalties it seeks to reopen in its motion.

also address what it has done to ensure that it responds to proposed assessments in a timely manner, in order to avoid a repeat of the mistakes it outlined in its motion.²

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

² Prompted by the Secretary's contradiction of Oak Grove's claim regarding the timing of its payment of uncontested penalties in this instance, we also note the following: (1) the proposed assessment at issue shows that, at least as of June 2010, Oak Grove was significantly delinquent with regard to the payment of penalties to MSHA; (2) the publicly available MSHA Data Retrieval System indicates that in the case of more than one recent assessment, Oak Grove has apparently timely contested certain penalties, but is delinquent in paying other penalties that were part of the same assessment. This information further detracts from Oak Grove's credibility in seeking relief from proposed penalty assessments that have become final orders.

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