FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 7, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. SE 2011-16
	:	A.C. No. 01-00851-221338
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 March 9, 2011, Oak Grove Resources LLC ("Oak Grove") renewed its previous motion to reopen penalties 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. In its original motion to reopen, Oak Grove stated that it wished to contest 27 of the penalties proposed for a total of nearly $111,000.[1] Oak Grove explained that it failed to timely file a contest due to a miscommunication between its counsel and its safety director. Its safety director further stated in an affidavit that the contest form was submitted in July 2010 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 opposed reopening of the proposed assessment on the ground that Oak Grove's inadequate or unreliable internal procedures did not constitute an adequate excuse for reopening. She further argued that the large amounts of the penalties involved suggested that the operator's internal procedures were particularly inadequate. She also stated that payment for the uncontested penalties was actually 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.

We denied Oak Grove's original motion without prejudice. We held, as we had in the past, including in other instances of Oak Grove defaults, 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. *Oak Grove Res. LLC*, 33 FMSHRC 103, 104-05 (Feb. 2011). We specified that should Oak Grove renew its request to reopen, it must do so within 30 days, fully explain the circumstances in its failure to timely contest the proposed assessment, and 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. *Id*. at 105. We further noted that the public record indicated that Oak Grove was significantly delinquent in the payment of uncontested penalties to MSHA, including with regard to assessments where it had contested some penalties. *Id*. at 105 n.2.

Regarding the circumstances surrounding the failure to timely contest the assessment, Oak Grove's renewed motion includes the same affidavit as was submitted with its original request that the Secretary has previously shown to be untrustworthy. Oak Grove's renewed motion also includes an affidavit from another company official, who explains the steps that have been subsequently taken to ensure that Oak Grove responds in a timely fashion to penalty assessments.

The Secretary continues to oppose Oak Grove's request to reopen, reiterating the grounds in her original response, and further arguing that Oak Grove's total delinquencies – over $750,000 – raise the question of whether the operator is acting in good faith. The Secretary

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[1] Oak Grove in its renewed motion, as it did in its original motion, refers to Order No. 6690851 and Citation No. 8518607 twice each when listing the penalties it seeks to reopen.

additionally notes that the fact that such delinquencies extend to the present date casts doubt on Oak Grove's claim that it has taken steps to timely respond to penalty assessments. Oak Grove did not reply to the Secretary's opposition, in which the Secretary raised serious issues regarding Oak Grove's penalty contest and payment practices.

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. *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); *Oak Grove*, 33 FMSHRC at 104. In this case, in the absence of any rebuttal or explanation, we conclude that the failure to communicate between Oak Grove's safety director and its counsel represents an inadequate or unreliable internal processing system as the Secretary has alleged. We also note that this type of miscommunication appears to be part of a pattern for Oak Grove, as shown by the fact that it also occurred in two other default cases recently before the Commission, Docket Nos. SE 2009-812 and SE 2009-850. *See Oak Grove Res. LLC,* 32 FMSHRC 1253, 1254 (Oct. 2010).

Additionally, the Secretary has questioned whether the operator is acting in good faith, based on a delinquency history showing 20 penalty cases with a total delinquency of approximately $758,361. 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). The operator's failure to respond to the Secretary's argument

that Oak Grove's delinquency history demonstrates bad faith supports our conclusion that Oak Grove has not met its burden of establishing entitlement to extraordinary relief.

Consequently, we again deny Oak Grove's request, this time with prejudice.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

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