FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 27, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2009-269
v.	:	A.C. No. 44-06947-158919
	:	
KEOKEE MINING, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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 May 7, 2009, the Commission received a request to reopen a penalty assessment issued to Keokee Mining, LLC ("Keokee") 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 July 31, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000158919 to Keokee, proposing penalties for three

citations and Order No. 6636916. Keokee states that it received the proposed assessment soon after it was issued and forwarded it to its counsel to contest the penalty for the order. The operator states that its counsel failed to file the contest through "inadvertence and oversight." Keokee maintains that it became aware that the proposed assessment had not been contested on May 4, 2009, when it contacted its counsel about individual civil penalties that the Secretary assessed against one of Keokee's supervisors.

The Secretary opposes reopening on the ground that Keokee has failed to make a showing of the exceptional circumstances that warrant reopening. The Secretary argues that the operator's conclusory statement that its counsel failed to timely contest the proposed penalty through inadvertence and oversight is insufficient to establish a basis for reopening. In addition, the Secretary contends that the operator fails to explain why, after it was informed that it had not contested the penalty assessment, it took as long as it did to request reopening. The Secretary asserts that although MSHA sent Keokee a delinquency notice on November 4, 2008, and the operator paid the assessment by check dated December 4, 2008, the operator did not request reopening until May 2009, approximately seven months after receiving the delinquency notice and six months after payment.

Having reviewed Keokee's request to reopen and the Secretary's response thereto, we agree that Keokee has failed to provide an adequate basis for the Commission to reopen the penalty assessment. Keokee's conclusory statement that its counsel failed to timely contest the proposed assessment through "inadvertence and oversight" lacks sufficient detail and does not provide the Commission with an adequate basis to reopen.[1] Furthermore, Keokee has failed to explain its delay in responding to the delinquency notice.[2] Keokee has also failed to explain why it is seeking reopening after paying the assessment. Accordingly, we hereby deny without prejudice Keokee's request. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009).

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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

[1] In requesting relief from a final order, a client may be held accountable for the acts and omissions of its attorney. *See Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 396-97 (1993) (holding that the neglect of both respondents and their counsel is relevant in determining whether respondents' failure to file their proofs of claim in a bankruptcy proceeding prior to the bar date was excusable); *Easley v. Kirmsee*, 382 F.3d 693, 698-700 (7th Cir. 2004) (although attorney carelessness may constitute "excusable neglect" under Rule 60(b)(1), attorney inattentiveness to litigation, such as failure to comply with pretrial scheduling orders and filing deadlines, is not excusable, and clients must be held accountable for the acts and omissions of their attorneys).

[2] In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009). Although the Secretary raised the issue that Keokee failed to explain why, after it was informed of the delinquency, it took as long as it did to request reopening, the operator did not file a reply providing an explanation. We encourage parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary's response. *See, e.g., Climax Molybdenum Co.*, 30 FMSHRC 439, 440 n.1 (June 2008).

Distribution:

Timothy W. Gresham, Esq.
Penn, Stuart & Eskridge
P.O. Box 2288
Abingdon, VA 24212

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021