FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 10, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2008-1214
v.	:	A.C. No. 15-18747-089953
SOLAR COAL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan, 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. (2000) ("Mine Act"). On May 14, 2008, the Commission received from Solar Coal Company ("Solar") a letter from its owner that was subsequently amended to make clear that Solar is 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). This order addresses the request to reopen the eighth of those assessments.[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).

In her letter to the Commission, in connection with asserting that the proposed penalty amount in a pending proceeding is more than the company can afford to pay, Solar's owner states that "[a]fter examining past citations and reviewing the compan[y's] financial records, I ask that the following cases be reopened and contested to a lower amount due to their outstanding balances." The eighth case listed is a proposed penalty assessment that the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Solar on June 1, 2006

[1] The request to reopen the other seven assessments is the subject of a separate, concurrently issued, consolidated order.

(A.C. No. 089953). In response, the Secretary states that inability to pay a penalty is not a grounds for reopening under Rule 60(b) of the Federal Rules of Civil Procedure, and notes that the assessment at issue cannot be reopened because it became a final order more than one year before Solar filed its reopening request.

We have held 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 inadvertence or mistake. *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).

We have been presented with Solar's failure to timely contest the proposed penalty assessment. Under Rule 60(b), any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect, not more than one year after the order was entered. Fed. R. Civ. P. 60(b). Because the proposed penalty assessment was issued on June 1, 2006, and Solar waited nearly two years to seek relief, its request is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, Solar's request is denied.

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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