

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001

July 30, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	Docket No. SE 2007-279
	:	A.C. No. 01-00851-112002-02
	:	
OAK GROVE RESOURCES, LLC	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY: Duffy, Chairman; and Young, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On June 8, 2007, the Commission received from Oak Grove Resources, LLC (“Oak Grove”) a motion by counsel seeking 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).

On February 13, 2006, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Citation No. 7687956 to Oak Grove. Subsequently, Oak Grove received a proposed assessment which included the citation in question. Oak Grove apparently returned the assessment form to MSHA on time and contested the proposed assessments for two orders but did not check the box for Citation No. 7687956. In Oak Grove’s motion to reopen, counsel states that “[m]istake and excusable neglect led to Oak Grove not contesting” the proposed assessment for Citation No. 7687956 and that it had always been its intent to do so. Mot. at 2.

In response, the Secretary states that she opposes reopening the penalty because the operator’s “conclusory statement is insufficient to warrant reopening.” Resp. at 3. However,

attached to Oak Grove's motion is an affidavit from Oak Grove's safety director, the official responsible for filing contests, who stated that he intended to check the box for Citation No. 7687956 on the assessment form but he inadvertently failed to do so.

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).

Having reviewed Oak Grove's motion to reopen and the Secretary's response thereto, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Oak Grove's failure to timely contest the penalty proposal and whether relief from the final order should be granted. *See Mosaic Phosphates Co.*, 28 FMSHRC 925, 925-26 (Nov. 2006). If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

I would deny Oak Grove's request for relief from the final order. Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, we have previously afforded a party relief from a final order on the basis of inadvertence or mistake. Slip op. at 2. However, here the operator has merely proffered the generalized explanation that its failure to timely contest the penalty assessment was due to "[m]istake and excusable neglect." Mot. at 2. The Secretary correctly states that this conclusory excuse does not suffice to warrant a reopening.¹

Because Oak Grove has failed to provide any meaningful explanation to justify its failure to timely contest the proposed penalty assessment, I find no grounds upon which relief could be granted in this case, and would deny the company's request and dismiss these proceedings without prejudice. See *Marsh Coal Co.*, 28 FMSHRC 473, 475 (July 2006) (denying request to reopen final Commission order where operator failed to set forth grounds justifying relief); *Eastern Associated Coal, LLC*, 28 FMSHRC 999, 1000 (Dec. 2006) (same).

Mary Lu Jordan, Commissioner

¹ The Secretary also argues that the operator should be required to identify facts that, if proven on reopening, would establish a meritorious defense. I need not reach that issue, however, as I would deny Oak Grove's motion on the ground that it failed to provide an adequate explanation for its failure to timely contest.

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