FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 24, 2021

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2019-0461-M
ADMINISTRATION (MSHA)	:	A.C. No. 45-03745-490744
	:	
v.	:	
	:	
COPENHAVER CONSTRUCTION, INC.	:	

BEFORE: Traynor, Chair; Althen and Rajkovich, 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. (2018) ("Mine Act"). On July 23, 2019, the Commission received from Copenhaver Construction, Inc., a motion seeking to reopen a penalty assessment that it previously paid. The Secretary did not oppose the request.

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 orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *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 4, 2019, the Mine Safety and Health Administration ("MSHA") received a $8,062 payment from Copenhaver in satisfaction of the 15 citations at issue in this proceeding.

Sometime thereafter, Copenhaver contested a specially assessed civil penalty for an additional citation which was issued by an MSHA inspector during the same inspection as the 15 subject citations. Copenhaver represents that after receiving the special assessment and conferring with counsel, it now desires to contest every citation that arose from the inspection.

Yet, Copenhaver concedes that its change-of-heart "does not reflect indifference, inattention or general carelessness." Mot. at 1. And its motion does not assert that the operator made a mistake, nor does it provide any other reason that would justify relief pursuant to Rule 60(b). Accordingly, Copenhaver's motion is deficient on its face. The operator has failed to establish good cause to reopen a final order. *See Brzeczek v. Centerior Energy*, 221 F3d 1333 (6th Cir. 2000) ("A change of mind is not an adequate basis to vacate a judgment pursuant to Rule 60(b).").[1]

Therefore, the operator's motion is DENIED.

Arthur R. Traynor, III, Chair

William I. Althen, Commissioner

Marco M. Rajkovich, Jr., Chairman

[1] Furthermore, on November 6, 2019, a Commission Judge issued a Decision Approving Settlement for the referenced specially assessed penalty (Docket No. WEST 2019-0457-M.) Copenhaver agreed to pay a regularly assessed penalty in lieu of the specially assessed penalty.

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