FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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January 12, 2009

SECRETARY OF LABOR,	:	Docket No. KENT 2008-1111
MINE SAFETY AND HEALTH	:	A.C. No. 15-12564-125861
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2008-1181
v.	:	A.C. No. 15-12564-127886
	:	
LEFT FORK MINING COMPANY, INC.	:	Docket No. KENT 2008-1182
	:	A.C. No. 15-12564-130206

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY: Jordan, Young, and Cohen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").[1] On May 28, and June 20, 2008, the Commission received from Left Fork Mining Company, Inc. ("Left Fork") a letter and motions seeking to reopen 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).

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 August 28, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000125861 to Left Fork, proposing civil penalties for several citations, including 27 citations currently at issue. On October 2, 2007, MSHA issued Proposed Assessment No. 000127886 to Left Fork for six citations, including two citations

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate Docket Nos. KENT 2008-1111, KENT 2008-1181, and KENT 2008-1182, as all dockets involve similar procedural issues and similar factual backgrounds. 29 C.F.R. § 2700.12.

presently at issue. On October 30, 2007, MSHA issued Proposed Assessment No. 000130206 to Left Fork for several citations, including four citations presently at issue.

On November 29, 2007, MSHA issued a Notice of Delinquency to Left Fork pertaining to Proposed Assessment No. 000125861. On December 26, 2007, MSHA issued a Notice of Delinquency to Left Fork pertaining to Proposed Assessment No. 000127886. On January 30, 2008, MSHA issued a Notice of Delinquency to Left Fork pertaining to Proposed Assessment No. 000130206.

On May 13, 2008, counsel for MSHA sent Left Fork a letter pertaining to the delinquencies of all three proposed assessments. In this letter, MSHA stated that the total unpaid delinquencies amounted to $76,897.79, including statutory interest and administrative fees. MSHA further stated that unless payment was made by May 27, 2008, it would issue a citation under section 104(a) of the Mine Act charging Left Fork with a failure to comply with the Commission's final orders and for failing to comply with sections 105 and 110(j) of the Mine Act. MSHA also stated that if Left Fork should fail to abate the section 104(a) citation, it would necessitate the issuance of a mine closure order.

On May 28, 2008, the Commission received a letter from Left Fork's safety director, stating with respect to Proposed Assessment No. 000125861 that Left Fork did not receive a conference regarding the citations on the proposed assessment form that it had "checked for contest." Left Fork alleged that MSHA was seeking payment of penalties associated with the citations that Left Fork indicated it was contesting, and that there had been an error. The Secretary responded that Left Fork failed to make a showing of exceptional circumstances required to obtain reopening under Fed. R. Civ. P. 60(b). She further stated that MSHA had no record of having received a contest of the proposed assessment. The Secretary requested that the Commission provide the operator with an opportunity to satisfy the requirements for reopening.

On June 20, 2008, the Commission received from Left Fork's counsel a memorandum responding to the Secretary's statement that the operator be given an opportunity to satisfy the requirements for reopening with respect to Proposed Assessment No. 000125861. On that same date, the Commission received motions to reopen from Left Fork's counsel with respect to Proposed Assessments Nos. 000127886 and 000130206.

In all three pleadings, Left Fork's counsel states that, upon receipt of the proposed assessments, the assessment forms were marked to indicate Left Fork's intent to contest the penalties associated with several citations, and then forwarded to Left Fork's Brookside office, consistent with company policy. Counsel maintains that "[t]hrough inadvertence or mistake," the completed assessment forms were not timely returned to MSHA. Counsel attached to the pleadings affidavits by Tony Nelson, Jr., Left Fork's safety director, in which the safety director states in part that "[b]ecause of a misunderstanding, personnel formerly employed in the Brookside office paid the uncontested penalties but apparently did not return the assessment cards to MSHA as contested."

On July 2, the Commission received responses to the three pleadings from the Secretary, in which the Secretary opposed the operator's requests to reopen the penalty assessments. The Secretary states that the operator does not explain how or why a mistake occurred in the Brookside office, but merely asserts that a mistake occurred. She submits that such a conclusory assertion is insufficient to establish exceptional circumstances that warrant reopening. In addition, the Secretary states that the operator failed to identify facts that, if proven on reopening, would establish a meritorious defense. She further states that the operator failed to explain why, after it was sent the Notices of Delinquency in each of the three cases many months earlier, it took as long as it did to request the reopenings. In this regard, the Secretary noted the letter sent by her counsel on May 13, 2008. The Secretary submits that the operator's filing of requests to reopen only when facing enforcement action does not demonstrate good faith.

On July 22, the Commission received from Left Fork a reply to the Secretary's responses. Left Fork asserts that, contrary to the Secretary's assertions, it did explain how or why a mistake occurred at the Brookside office. It states that the explanation was set forth in the safety director's affidavit when he stated that he intended to contest the penalties but that "[f]or reasons unknown" the proposed assessment was not returned to MSHA.

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 noted that Rule 60(b) "is a tool which . . . courts are to use sparingly . . . ." *Atlanta Sand & Supply Co.,* 30 FMSHRC 605, 608 (July 2008) (citing *JWR*, 15 FMSHRC at 789). We have also observed, however, 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 Left Fork's filings and the Secretary's responses, we agree with the Secretary that Left Fork has failed to make a showing of circumstances that warrant reopening. The operator's conclusory statements that its failure to timely file was due to "inadvertence or mistake" do not provide the Commission with an adequate basis to justify reopening. Even after the Secretary opposed Left Fork's motion on the grounds that it had set forth only a conclusory assertion in its attempt to justify relief, the operator merely responded that "[f]or reasons unknown, the proposed assessments were not returned as contested." L.F. Reply at 2.

In addition, Left Fork fails to explain its failure to act after receiving Notices of Delinquency in November, December, and January. Rather, the record reveals that the operator did not seek relief until it faced the enforcement action described in MSHA's May 13, 2008 letter

to the operator, including potential mine closure. Despite the receipt of a Notice of Delinquency in each of the three penalty assessments, Left Fork did not seek reopenings until approximately eight months after each of them became final, and approximately six months after MSHA notified the operator of its delinquencies in the three cases.

Left Fork, as the movant, carries the burden of establishing its entitlement to extraordinary relief. Delay in seeking that relief, if unexplained, has been a relevant consideration in denial of motions to reopen. *See Central Operating Co. v. Utility Workers of America*, 491 F.2d 245, 253 (4th Cir. 1974) (finding "inexcusable dereliction"and denying motions to vacate when defendants waited almost four months after receiving notice of default judgments); *see also McLawhorn v. John W. Daniel & Co.*, 924 F.2d 535, 538 (4th Cir. 1991) (finding that unexplained delay of three-and-a-half months was not reasonable).

Left Fork has provided no explanation for what cannot be objectively viewed as a prompt and diligent response, including its failure to seek relief of any type from the final orders until after MSHA threatened further enforcement action and closing the mine for non-payment. Accordingly, we deny Left Fork's requests.

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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

Chairman Duffy, dissenting:

While I agree with the majority that Left Fork has not been as responsive as it could and should have been regarding its failure to return the contest forms, and has thus far failed to explain why it waited so long to act after MSHA had sent it delinquency notices, I do not agree that the operator's failures justify denial of its requests to reopen with prejudice. Rather, I would deny the requests without prejudice, to allow Left Fork, should it choose to renew its requests to reopen, the opportunity to explain why it waited five to six months following its receipt of delinquency notices before filing its original requests to reopen. *See Pinnacle Mining Co.*, Docket Nos. WEVA 2008-927, etc., slip op. at 4 (Dec. 17, 2008) (denying without prejudice requests to reopen ten assessments, totaling over $250,000 in proposed penalties, that had gone final because of operator inaction, and noting that any renewed request for reopening should address, among other matters, the operator's actions following the receipt of delinquency notices regarding nine of the assessments).

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Michael F. Duffy, Chairman

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