FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. CENT 2017-166-M
	:	A.C. No. 41-04108-386782
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	:	Docket No. CENT 2017-167-M
v.	:	A.C. No. 41-04108-403245
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OLMOS CONTRACTING 1, LLC	:	Docket No. CENT 2017-168-M
	:	A.C. No. 41-04108-417522
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	:	Docket No. CENT 2017-169-M
	:	A.C. No. 41-04108-419904
	:	
	:	Docket No. CENT 2017-170-M
	:	A.C. No. 41-04108-422215
	:	
	:	Docket No. CENT 2017-171-M
	:	A.C. No. 41-04108-424371
	:	
	:	Docket No. CENT 2017-172-M
	:	A.C. No. 41-04108-426561

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On January 17, 2017, the Commission received from Olmos Contracting 1, LLC ("Olmos") a motion seeking to reopen seven penalty assessments[1] that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[2]

[1] For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers CENT 2017-166-M, CENT 2017-167-M, CENT 2017-168-M, CENT 2017-169-M, CENT 2017-170-M, CENT 2017-171-M, and CENT 2017-172-M involving similar procedural issues. 29 C.F.R. § 2700.12.

[2] On May 15, 2017, Robert Wachsmuth & Associates ("RWA") moved to withdraw itself as counsel for Olmos. According to RWA, Olmos has ceased all communication and has failed

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).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that six proposed assessments in Docket Nos. CENT 2017-166-M, CENT 2017-167-M, CENT 2017-168-M, CENT 2017-169-M, CENT 2017-170-M, and CENT 2017-172-M were delivered to Olmos between July 2015 and December 2016. The proposed assessment in CENT 2017-171-M was issued on November 15, 2016, but was returned unclaimed. With the exception of the proposed assessment in CENT 2017-172-M, which was timely contested, the proposed assessments became final orders 30 days after they were received or had been returned unclaimed.[3]

Olmos asserts that it had never been inspected by MSHA prior to July 2015 and that its employees were unaware that MSHA intended to issue penalties in association with violations that had been terminated. In addition, Olmos argues that the proposed assessments were mailed to the company's director—who Olmos contends was more akin to an "office manager" or "executive secretary"—and that, with the exception of CENT 2017-166 and 2017-167, these

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to pay for professional services rendered since January 12, 2017. After review of the motion, the motion is granted, and RWA is hereby relieved of any and all further duties and responsibilities for Olmos in these cases.

[3] The proposed assessment in Docket No. CENT 2017-166-M was delivered on July 17, 2015 and became a final order of the Commission on August 17, 2015. The assessment in Docket No. CENT 2017-167-M was delivered on February 22, 2016 and became final on March 23, 2016. The assessment in Docket No. CENT 2017-168-M was delivered on August 22, 2016 and became final on September 21, 2016. The assessment in Docket No. CENT 2017-169-M was delivered on September 19, 2016 and became final on October 19, 2016. The assessment in Docket No. CENT 2017-170-M was delivered on October 17, 2016 and became final on November 16, 2016. The assessment in Docket No. CENT 2017-171 was returned unclaimed and was deemed a final order by MSHA on December 19, 2016.

proposed assessments were not brought to the attention of Olmos management until MSHA emailed the company on November 29, 2016. Olmos also contends that the economic impact of the penalties could adversely affect the company's ability to stay in business.

The Secretary opposes the motion, arguing that Olmos failed to adequately explain why the proposed penalties were not contested. The Secretary points out that, while Olmos implicates its director as responsible for mismanaging Docket Nos. CENT 2017-168-M, CENT 2017-169-M, CENT 2017-170-M, and CENT 2017-171-M, the operator provides no such explanation for its failure to timely contest the proposed penalties in CENT 2017-166-M and CENT 2017-167-M. In addition, the Secretary argues that Olmos' economic hardship is not a valid ground for reopening.

Due to the extraordinary nature of reopening a penalty that has become final, the operator has the burden of showing that it should be granted such relief through a detailed explanation of its failure to timely contest the penalty and any delays in filing for reopening. The Commission considers the entire range of factors relevant to determining mistake, inadvertence, excusable neglect, or other good faith reason for reopening. Further, Rule 60(c) of the Federal Rules of Civil Procedure provides that a motion to reopen shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(c).

The motion to reopen the assessment in Docket No. CENT 2017-166-M was filed more than one year after the proposed penalties became a final order of the Commission. Therefore, under Rule 60(c), Olmos' motion is untimely with respect to this case. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

In Docket Nos. CENT 2017-167-M, CENT 2017-168-M, CENT 2017-169-M, and CENT 2017-170-M, Olmos has failed to adequately establish a basis for reopening. *See E. Associated Coal, LLC*, 30 FMSHRC 392, 394 & n. 2 (May 2008) (operators filing a motion to reopen must "provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment" and "disclose with specificity its grounds for relief."). The operator contends that it directed all proposed assessments to Olmos' director, but that the director was so unfamiliar with the MSHA citation process, she thought that abatement of the citations would prevent MSHA from assessing any penalties.[4] While unfamiliarity with contesting procedures may be grounds for reopening a final order, the Commission has generally required the operator to clearly demonstrate that it intended to contest the citations prior to filing the motion to reopen. *See Harriman Coal Corp.*, 23 FMSHRC 153, 154-55 (Feb. 2001); *J.P. Donmoyer, Inc.*, 24 FMSHRC 665, 666 (July 2002). In the present case, there is no indication that Olmos took any actions to manifest its desire to contest the penalties. To the contrary, Olmos has not claimed to have had any further discussions with MSHA about the citations after they were abated, and has paid $981 of the $990 penalty proposed in Docket No. CENT 2017-166-M.

[4] Even if Olmos's director initially believed that no penalties would be assessed, it is unclear how she could have maintained this belief after receiving multiple proposed assessments which place operators on notice of the penalties and provided instructions for contesting the penalties to the Commission.

Even if we were to excuse the director's unfamiliarity with the basic tenets of the Mine Act, Olmos' explanation does not fully explain the apparent lack of attention to a series of citations alleging serious safety and health violations. Olmos implies in its initial motion that the company director *did* notify Olmos' principals of the penalties assessed in Docket Nos. CENT 2017-166-M and CENT 2017-167-M. Olmos did not contest either of these proposed penalties and partially paid the first assessment, which MSHA issued in May 2015. Moreover, in its motion Olmos states that it received no citations from MSHA during an inspection in December 2015. To the contrary, however, CENT 2017-167-M involves three citations written to the mine on December 21-22, 2015.

With respect to the penalties issued following a set of MSHA inspections in July 2016, Olmos management was aware that MSHA had found significant safety concerns at its Vogel Pit mining operation. In a sworn affidavit, Larry Struthoff, Manager of Olmos and operator of the Vogel Pit, avers that he was made aware on July 13, 2016 that MSHA had "shut down the mining operation" because of hazardous ground conditions.[5] Despite Olmos' assertions of its dire financial state, the operator failed to abate the violations, allowing the withdrawal order to stay in place for 56 days during the "peak summer construction period." Olmos' principals never attempted to inquire if such a drastic enforcement action by MSHA would result in any civil penalties and did not timely contest the penalties that were assessed.

It is thus clear from the record that Olmos lacked even the most basic internal system for processing penalty assessments. As the Commission has consistently held, explanations for failures to timely contest a proposed penalties founded upon a lack of internal procedures constitute inexcusable neglect and are an insufficient basis for reopening an assessment. *See, e.g., Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3346 (Nov. 2013); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Elk Run Coal Co.*, 32 FMSHRC 1587, 1588 (Dec. 2010).

Beyond the fatal lack of effective internal procedures, we find other bases which compel us to deny Olmos' motion to reopen the aforementioned four cases. Under Rule 60(c), a motion to reopen, regardless of its merit, is only granted if it is filed within a reasonable time. In the context of penalty assessments, in considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a notification from MSHA and the operator's filing of its motion to reopen. *Highland Mining Co.*, 31 FMSHRC 1313, 1316 (Nov. 2009). Once Struthoff was made aware that he had failed to timely contest the proposed penalties, he did not take prompt action to try to rectify the situation. According to Struthoff's own account, he received an email from MSHA on November 29, 2016 notifying him that the proposed assessments had become final. The present motion to reopen was filed on January 17, 2017, 49 days later. Olmos has provided no explanation for this delay. This alone is reason enough to deny the motion. *See id.*

With respect to Docket No. CENT 2017-171-M, the Secretary states that the proposed assessment was returned undelivered. However, the Secretary offers no evidence that the

[5] According to MSHA's Mine Data Retrieval System, MSHA issued two section 107(a) imminent danger withdrawal orders on July 13, 2016.

assessment was mailed to the operator's address of record or if an alternate means of delivery was attempted.

MSHA must attempt to mail proposed penalties to the operator's correct address in order to constitute valid service. *See, e.g., Brahma Group, Inc.*, 31 FMSHRC 527 (May 2009). If the proposed penalty is sent to an incorrect address, the operator has not been notified pursuant to 30 U.S.C. § 815(a) and the 30-day contest deadline was not triggered. *Id.* As Olmos was not notified of the proposed assessment, the penalties never became a final order of the Commission. The motion to reopen, as it pertains to CENT 2017-171-M, therefore is moot.

Although Olmos has moved to reopen CENT 2017-172-M, the Secretary states that the proposed assessment in that case was timely contested. Subsequent to the filing of the motion to reopen, the Secretary filed a petition with the Commission, and the case was docketed as CENT 2017-178-M and assigned to Administrative Law Judge Margaret Miller. On June 20, 2017, Judge Miller approved a settlement resolving all of the contested penalties. As this matter was timely contested and has now been resolved, the motion to reopen this case is moot.

Accordingly, we deny the motion to reopen Docket Nos. CENT 2017-166-M, CENT 2017-167-M, CENT 2017-168-M, CENT 2017-169-M, and CENT 2017-170-M. The motion to reopen Docket No. CENT 2017-172-M is dismissed, since that case has been settled.

We find that the motion to reopen Docket No. CENT 2017-171-M is moot. Because Olmos was not notified of the proposed assessment, it never became a final order of the Commission. Therefore, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

William I. Althen, Acting Chairman

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Michael G. Young, Commissioner

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