FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 22, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. KENT 2011-1153
	:	KENT 2011-1154
v.	:	KENT 2011-1530
LONE MOUNTAIN PROCESSING, INC.	:	

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

DECISION

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). These cases come to the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit. *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161 (D.C. Cir. 2013). The Court directed the Commission to review the Commission's denial of three motions filed by Lone Mountain Processing, Inc. to reopen the penalty assessment cases, in light of prior Commission decisions that an operator's contest of an underlying citation demonstrates an intent to contest the penalty. *Id.* at 1163. Consistent with the Court's mandate and our precedent, we again deny all three motions to reopen.

I.

Factual Background

In June 2010, the Mine Safety and Health Administration ("MSHA") issued 30 citations to Lone Mountain for a range of violations in connection with a fatality that had occurred at the Clover Fork No. 1 Mine. In July 2010, Lone Mountain filed timely pre-penalty notices of contest with the Commission, challenging 11 of the 30 citations.

On August 24, 2010, Lone Mountain received a proposed penalty assessment in the amount of $21,840. Because Lone Mountain did not contest the proposed assessment, the assessment became a final order of the Commission on September 23, 2010, pursuant to section 105(a) of the Act. 30 U.S.C. § 815(a). In December 2010, MSHA mailed a notice of delinquency for nonpayment of the final penalty amount.

On January 18, 2011, Lone Mountain received a second proposed assessment in the amount of $212,054. Because Lone Mountain did not contest the second proposed assessment, it became a final order on February 17, 2011. In April 2011, MSHA mailed Lone Mountain a notice of delinquency for nonpayment of this second final penalty amount.

On June 6, 2011, Lone Mountain filed two motions requesting that the two final orders be reopened. Lone Mountain's motions included an affidavit from its safety manager, asserting that on two separate occasions in August 2010 and January 2011, the proposed assessments were misplaced by Lone Mountain in the process of forwarding them from one of its offices to another. The motions did not explain, or even acknowledge, that the same failure had been repeated five months apart, or that it took the operator nine months and four months, respectively, to file these motions to reopen after the assessments had become final orders of the Commission. The motions also failed to address the fact that MSHA had mailed the operator delinquency notices in December 2010 (a month before the second proposed assessment was delivered) and April 2011. In his affidavit, Lone Mountain's safety manager assured the Commission that in order to avoid a repeat of this error, he would henceforth travel to the other office himself to collect the proposed assessments. Aff. at 3.

The Secretary opposed the motions to reopen and argued, among other things, that the fatality and the large penalty amounts should have alerted the operator to the consequences of its inadequate internal procedures. The Secretary questioned whether the operator was acting in good faith, in light of its delinquency record and its repeated disregard of proposed penalty assessments.

In September 2011, while the first two motions were pending before the Commission, Lone Mountain filed a third motion to reopen another proposed assessment. This proposed assessment had been delivered in July 2011, a month after the previous motions to reopen were filed. Unlike the prior motions, Lone Mountain had not timely contested the underlying citations resulting in this third assessment.[1] Nonetheless, it contended that it was important to reopen the final order because the penalty amount was $262,500.

Although the third motion mentioned the two previous motions pending before the Commission, Lone Mountain provided the same excuse for failing to timely contest the proposed assessment – another affidavit by the same safety manager, again claiming that the proposed assessment had been misplaced during delivery between the operator's two offices. There was no reference in the motion or the affidavit to the safety manager's prior assurances that he would collect the proposed assessments himself. Nor was there any indication of an attempt to correct the asserted repeated failures in the internal mail system and the lack of any procedures to follow up on proposed assessments and file timely contests.

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[1] In its first two motions, Lone Mountain erroneously referred to *13* previously contested citations and orders. We clarify that two of the 13 were actually not included in the two proposed assessments for which these motions were filed. Lone Mountain's third motion to reopen contained four underlying citations which were not timely contested.

After consideration of all the facts and arguments, we concluded that Lone Mountain had failed to establish entitlement to extraordinary relief. We found that the operator had been put on notice of its obligations but had neglected to fix the problems with its internal procedures. Because the operator made no showing of good cause or exceptional circumstances warranting reopening, we denied its motions to reopen. *Lone Mountain Processing, Inc.*, 33 FMSHRC 2373, 2376 (Oct. 2011).

Lone Mountain filed a petition for review with the D.C. Circuit, seeking review of the Commission's October 11, 2011 order. The Court subsequently remanded the case to the Commission for an explanation of whether our denial of the motions was consistent with Commission precedent that a contest of the underlying citation evidences an intent to contest the penalty. *Lone Mountain*, 709 F.3d at 1163-64.

II.

Legal Principles Applicable to Motions to Reopen Final Penalty Assessments

Section 105(d) of the Mine Act allows operators to challenge a citation or order within 30 days of receipt regardless of whether a proposed penalty assessment has been issued. 30 U.S.C. § 815(d). In accordance with the statute, Commission Procedural Rule 20 permits operators to contest a citation within 30 days of receipt, before the Secretary of Labor issues a proposed assessment. 29 C.F.R. § 2700.20.

Separately, under section 105(a) of the Mine Act, the Secretary must notify a mine operator of the proposed civil penalty for the issuance of any citation or order. 30 U.S.C. § 815(a). In turn, an operator who wishes to contest a proposed penalty must notify the Secretary no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary within the 30-day period, the proposed penalty assessment becomes a final order of the Commission by operation of the statute. *Id.* Commission Procedural Rule 21 explicitly states that the filing of a notice of contest of an underlying citation does *not* constitute a challenge to a subsequently issued proposed penalty assessment, which must be filed as a separate notice of contest. 29 C.F.R. § 2700.21; *see Marfork Coal Co.*, 29 FMSHRC 626, 636 (Aug. 2007).[2]

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 finds guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which a party may be relieved from a final order of the Commission upon a showing of mistake, inadvertence, surprise, excusable neglect, or other

[2] MSHA's notice of the proposed penalty assessment specifically informs operators that filing a prior notice of contest does not relieve them of the obligation to timely contest the proposed assessment.

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.

Due to the extraordinary nature of reopening a penalty that has become final, the operator has the burden of showing that it is entitled to such relief, through a detailed explanation of its failure to timely contest the penalty and any delays in filing for reopening:

> An operator seeking to reopen a proceeding after a final order is effective bears the burden of establishing an entitlement to extraordinary relief. At a minimum, the applicant for such relief must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure. . . .

Higgins Stone Co., 32 FMSHRC 33, 34 (Jan. 2010).

In reviewing an operator's explanation, we consider the entire range of factors relevant to determining mistake, inadvertence, surprise, excusable neglect, or other good faith reason for reopening. No precise formula exists for weighing the factors, and the analysis is conducted on a case-by-case basis. However, key factors are readily identifiable.[3]

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[3] The Commission has provided guidance to operators on its website with regard to factors that will generally be considered in determining whether to grant relief:

> The Commission has considered a number of factors in determining whether good cause exists: the error does not reflect indifference, inattention, inadequate or unreliable office procedures or general carelessness; the error resulted from mistakes that the operator typically does not make; procedures to prevent, identify and correct such mistakes have been adopted or changed, as appropriate; in cases where receipt of the penalty assessment is an issue, the operator maintains proper addresses with MSHA. Motions for relief must identify and explain: why a timely contest was not filed; how and when you first discovered the failure to timely contest the penalty and how you responded once this was discovered. . . .

FMSHRC, *Requests to Reopen*, http://fmshrc.gov/content/requests-reopen (last visited November 18, 2013).

We have repeatedly and unequivocally held that a failure to contest a proposed assessment as a result of an inadequate or unreliable internal processing system does not establish grounds for reopening an assessment. *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1061, 1062 (Dec. 2008).

Further, we have emphasized the importance of the operator's explanation of the time it took to file for reopening after receipt of a notice of delinquency. In *Highland Mining Co.*, the Commission advised operators:

> In the future, to save time and conserve its resources, the Commission will ordinarily analyze the question of whether the request to reopen was filed in a reasonable time in the following manner. Motions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will presumptively be considered as having been filed within a reasonable amount of time.
>
> Motions to reopen filed more than 30 days after receipt of such information from MSHA should include an explanation for why the operator waited so long to file for reopening. The lack of such an explanation is grounds for the Commission to deny the motion.

31 FMSHRC at 1316-17.

Of course, the good faith of the operator's actions is also a factor. *Pioneer Inv. Servs. Co. v. Brunswick Associated Ltd. P'ship*, 507 U.S. 380, 395 (1993); *FC Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006); *Oak Grove Res. LLC*, 33 FMSHRC 1130, 1132 (June 2011). An operator's detailed recounting of the circumstances should demonstrate that the operator acted at all times in good faith and without any purpose of evasion or delay, taking into account the nature of the violation, the amount of the penalty, the circumstances of receipt and processing of the notice, whether errors were within the operator's control, and the reasons for any delay in filing the motion itself, especially after notice of a delinquency.

We also consider MSHA's acquiescence or opposition to the motion. We do this not simply to ascertain MSHA's position, but also to determine if MSHA's response contributes to the analysis of the multitude of factors related to the operator's failure to contest the penalty in a timely manner.

The Commission also takes into account, as we did in reaching our initial decision, that the filing of a contest of an underlying citation is an indication of an initial intent to contest the subsequent proposed assessment. *E.g., Oldcastle Stone Prods.*, 31 FMSHRC 1103, 1104 (Oct.

2009). The Commission has not held that a challenge to the citation creates a presumption, rebuttable or irrebuttable, of a right to reopen after failing to contest the penalty. The filing of a challenge to the underlying citation is a factor and, indeed, in many cases may be an important factor. However, all factors relevant to reopening are weighed. The challenging of a citation does not inevitably excuse the failure to contest the penalty.

III.

Disposition

In accordance with the Court's remand, the Commission has again considered Lone Mountain's motions to reopen, in light of Lone Mountain's contest of 11 citations issued in June 2010, that were among the citations that were assessed in the proposed assessments issued in August 2010 and January 2011.[4] The filing of those 11 notices of contest is clearly outweighed by the overwhelming evidence establishing that, in accordance with the Commission's precedent, the operator in this case should not be relieved of the responsibility for the final orders imposed following its default.

First, as stated above, a primary factor considered by the Commission is whether the operator's failure to file a timely contest resulted from "inadequate or unreliable office procedures." Our previous decision rested on our affirmative finding that Lone Mountain's failures "represent[ed] an inadequate or unreliable internal processing system." 33 FMSHRC at 2375. The identical problem assertedly occurred three separate times in less than a year, and Lone Mountain, despite its safety manager's assurances, took no effective action to correct its internal processing system deficiencies. Its failure to provide a reliable system was held to be dispositive.

In support of its motion to reopen Docket No. KENT 2011-1153, the operator submitted the affidavit of Lone Mountain's Safety Manager, Wilburn Howard, dated June 2, 2011 in which Mr. Howard stated in part:

> Lone Mountain received the proposed assessments for Assessment Case Numbers 000228827 and 000243808, but the sheets were sent to Patrick Leedy our Chief Engineer, who then forwarded them to me by courier. Mr. Leedy and I are located in different office buildings approximately 10 miles away. During the delivery of these assessments they were misplaced. *We are changing the way of delivery of these assessments in which I will personally travel to our office weekly to collect these assessment sheets to avoid a repeat of this error*. [emphasis added]

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[4] Lone Mountain did not contest any of the four citations that were assessed a total civil penalty of $262,500 mailed by MSHA in July 2011 and addressed in its third motion to reopen. Therefore, the factor of a prior contest of the underlying citations does not come into play with respect to that motion.

In support of its motion to reopen Docket No. KENT 2011-1154, the operator submitted an identical June 2, 2011 affidavit in which Mr. Howard again represented that:

> *We are changing the way of delivery of these assessments in which I will personally travel to our office weekly to collect these assessment sheets to avoid a repeat of this error*. [emphasis added]

Approximately a month and a half *after* Mr. Howard executed the above-referenced affidavits, Lone Mountain was served on July 20, 2011 with the proposed assessment it seeks to reopen in Docket No. KENT 2011-1530. In support of its motion to reopen, the operator submitted an affidavit from Mr. Howard dated September 15, 2011. Despite the prior representations Mr. Howard made to this Commission that the operator was changing its internal processing system to avoid future problems, in the most recent affidavit Mr. Howard stated:

> The proposed assessment sheet for A.C. Number 000261203 was addressed to Patrick Leedy our Chief engineer. According to the "Retrieve Report" provided by the Civil Penalty Office, the assessments sheet was delivered and signed or by "S. Roddy" on July 20, 2011. Susie Roddy is a secretary of Lone Mountain. *After signing, Ms. Roddy would have placed this information in Patrick Leedy's mailbox, who would have then forwarded it to me by courier*. During the delivery of these assessments they were apparently misplaced or may have been sent to the wrong location. [emphasis added]

Clearly, the operator had taken no action to rectify the problem. Its final affidavit, which is inconsistent with the assurances in the two previous affidavits, undermines its credibility and leads us to question its sincerity in making its initial assurances of procedural reform.

Second, in addition to the fatal defect found in its internal processing system, Lone Mountain did not explain its failures to respond to MSHA's delinquency letters in a timely fashion. Under Commission precedent set forth above, an operator that fails to move to reopen within 30 days after learning that it did not file a timely challenge to a proposed assessment must provide sufficient explanation for the delay. In this case, Lone Mountain waited six months and two months after receiving its first two delinquency notices before filing its motions to reopen. Then, even though the Secretary pointed out Lone Mountain had failed to justify those delays, Lone Mountain never provided any further explanation. It did not simply provide an insufficient excuse for failing to file for months after receipt of notices of delinquency – it failed to provide any excuse at all.

Third, Lone Mountain failed to establish that its motions to reopen were filed in good faith, a factor specifically challenged by the Secretary in her response. The Secretary highlighted Lone Mountain's repeated failures to meet deadlines in this case, and its outstanding delinquency total of approximately $550,000 (which includes the penalties involved in the first two motions to reopen), in arguing that Lone Mountain may not have filed the motions in good faith. Lone Mountain did not rebut the Secretary's argument. We have held that silence in the face of a delinquency history with

nearly identical facts militates against the grant of extraordinary relief. *Oak Grove Res., LLC*, 33 FMSHRC at 1132.

It is thus apparent that the facts and our precedent impose significant barriers to granting extraordinary relief in this case. Against this backdrop, we now turn to the D.C. Circuit's admonition that we should have explained why we had ruled in some prior cases that operators' challenges to citations justified granting motions to reopen, but that the contest of the citations in Lone Mountain did not warrant relief. 709 F.3d at 1164. As set forth below, those cases are substantially distinguishable from Lone Mountain and do not support reopening when compared to the number and weight of factors against reopening.

In *Oldcastle Stone Prods.*, the operator was inexperienced with MSHA contest procedures and asserted that it did not know it had to contest the proposed assessment in addition to contesting the underlying citation. Oldcastle's counsel discovered the delinquency one month after the proposed assessment became a final order of the Commission (before receiving any notices from MSHA) and filed a motion to reopen within one week. 31 FMSHRC at 1104. We determined that Oldcastle had demonstrated an intent to contest the proposed penalty and reopened the citation. *Id.* at 1104-05.

Oldcastle did not involve a defect in the operator's internal processing of penalty assessments. Rather, it claimed ignorance of a requirement to *also* contest the penalty where it had contested the citation. In *Oldcastle*, we re-opened the penalty for one citation which had been contested and refused to reopen those where no contest had been filed, consistent with the operator's excuse. *Id.* at 1104. It is also noteworthy that Oldcastle discovered its failure on its own and acted promptly to seek reopening, unlike the present case.

In contrast to Oldcastle, Lone Mountain is an experienced operator that was fully aware of the procedures for contesting proposed assessments. Lone Mountain does not argue that it was unaware of the contest procedures; it maintains instead that it repeatedly misplaced the critical paperwork. Unlike the instant case, *Oldcastle* did not involve a deficient internal processing system, unexplained delays in filing motions to reopen, and no response to the Secretary's allegation of bad faith.

The other two cases cited by the Court – *McCoy Elkhorn Coal Corp.*, 33 FMSHRC 1 (Jan. 2011), and *Phelps Dodge Sierrita, Inc.*, 24 FMSHRC 661 (July 2002) – arose in a very different context from *Lone Mountain*. Both of those cases involved inadvertent payments of proposed penalties where each operator argued that it intended to contest the proposed assessments. Commission case law establishes that the payment of a proposed penalty forecloses the operator from challenging the underlying citation and the penalty itself unless the operator can show that the payment was inadvertent. *See, e.g., Ranger Fuel Corp.*, 12 FMSHRC 363, 370 (Mar. 1990). Thus, the operators' prior challenges of the underlying citations in the two cases were significant only because they supported the operators' claims that the penalty payments had been inadvertent. Because the instant case does not involve an inadvertent payment issue, the holdings in the two cases do not apply to this case. Likewise, neither *McCoy Elkhorn* nor *Phelps Dodge* involved major factors such as deficient internal processing systems, unexplained delays in filing motions to reopen, or allegations of bad faith.

In again denying Lone Mountain's motions to reopen, the Commission is not departing from precedent. We have carefully considered all the facts and arguments to decide whether extraordinary relief is warranted, including the contests of 11 of the citations. Having done so, we find Lone Mountain's failures to be far more significant, including the grossly deficient internal processing procedures, unexplained delays in filing motions to reopen after learning it had missed deadlines through receipt of delinquency notices, and its failure to establish that the motions were filed in good faith. The fact that Lone Mountain challenged some of the underlying citations does not overcome its numerous failures to file timely penalty contests and its lack of adequate explanations of those failures. A different result is not warranted by Commission precedent regarding contests to underlying citations.

IV.

Conclusion

For the reasons set forth above, we again conclude that Lone Mountain has failed to establish that it should be granted extraordinary relief because of mistake, inadvertence, excusable neglect, or other just cause. Because of its repeated failures to meet its obligations, its lack of adequate explanations for its delays, and its inability to demonstrate that its motions were filed in good faith, Lone Mountain falls far short of establishing good cause for granting relief.

Accordingly, we again deny Lone Mountain's motions to reopen.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
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/s/ William I. Althen
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