FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 12 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
	:	Docket No. WEST 2016-488-M
v.	:	A.C. No. 26-01621-377475 A9039
ENVIRO CARE INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On April 15, 2016, the Department of Labor's Mine Safety and Health Administration ("MSHA") received from Enviro Care Inc. ("Enviro") a motion 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).

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).

MSHA issued two citations to Enviro on February 3, 2015, Citation Nos. 8869483 and 8869484. On Feb 11, 2015, the Division Manager for Enviro's office in Elko, Nevada, requested

a meeting with MSHA to clarify the regulations related to these alleged violations. At the time, Enviro tentatively planned to request that these citations be vacated. While Enviro claims that this meeting never occurred, the Secretary provided records showing that the conference occurred on February 19, 2015, via telephone. The Secretary states that this meeting resulted in Citation No. 8869483 being upheld and Citation No. 8869484 being vacated; therefore, only one citation remains at issue.

The proposed assessment for Citation No. 8869483 was issued on March 26, 2015, and proposed a penalty of $100. MSHA did not issue a proposed assessment for Citation No. 8869484. The Secretary asserts that the proposed assessment was delivered on April 2, 2015, and became a final order of the Commission on May 4, 2015.

Enviro concedes that the proposed assessment was correctly sent to its Safety Manager at its North Salt Lake office in Utah. However, Enviro asserts that when its North Salt Lake office received the assessment, the position of safety manager was in transition because a new safety manager was in the process of being appointed. In addition, the Division Manager, who had requested the meeting with MSHA, did not view the assessment because he was part of the Elko office, not the North Salt Lake office. Consequently, office personnel who did not normally handle MSHA assessments reviewed the assessment in this matter, assumed that it was a bill, and accidentally paid the civil penalty at issue.

The Secretary asserts that he mailed a delinquency notice to Enviro on June 18, 2015. MSHA received a payment check from Enviro for $100 dated June 23, 2015.

The Secretary opposes the request to reopen. The Secretary argues that Enviro's failure to contest the proposed assessment was caused by inadequate or unreliable internal procedures, which does not justify reopening under Rule 60(b)(1). The Secretary further states that the motion to reopen was filed with MSHA approximately 11 months after the assessment became a final order and approximately 10 months after the operator received the delinquency notice. The Secretary argues that this delay in filing the motion to reopen after the order became final and after the operator received the delinquency notice warrants denial of the motion to reopen.

Reopening a penalty that has become final is extraordinary relief. Thus, 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:

> 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. The Commission has long provided guidance to operators on its website explaining the 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: (1) the error does not reflect indifference, inattention, inadequate or unreliable office procedures or general carelessness; (2) the error resulted from mistakes that the operator typically does not make; (3) procedures to prevent, identify and correct such mistakes have been adopted or changed, as appropriate; (4) . . . A proper motion must also provide all relevant documentation and identify the persons who have knowledge of the circumstances. . . . Motions for relief must identify and explain: (1) why a timely contest was not filed; (2) how and when you first discovered the failure to timely contest the penalty and how you responded once this was discovered (3) If the motion to reopen was filed more than 30 days after you first learned that the penalty was not timely contested, you must provide a reasonable explanation for the delay or your motion may be DENIED.

FMSHRC, *Requests to Reopen*, https://www.fmshrc.gov/content/requests-reopen (last visited April 4, 2017).

In addition, we consider the good faith of the operator's actions and whether MSHA opposed the motion to reopen. *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). To justify reopening, 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, and the circumstances of receipt and processing of the proposed assessment. The operator's motion should also address whether errors were within the operator's control, and the reasons for any delay in filing the motion itself, especially after notice of the delinquency.

Under Rule 60(c) of the Federal Rules of Civil Procedure, a Rule 60(b) motion 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). MSHA's June 18, 2015 delinquency notice gave Enviro notice that it had failed to contest the proposed assessment, but Enviro did not file this motion to reopen until April 2016. Although Enviro's motion to reopen is not expressly barred by the one year limit set forth in Rule 60(c), the rule still illustrates the importance of filing expeditiously. The operator knew of its default for nearly ten months and failed to file this motion to reopen until approximately 11

months after the assessment became a final order. Further, it did not explain the lengthy delay in filing, including the 10 month delay after receiving a delinquency notice from the Secretary.

The operator has offered no excuse for failing to act until the motion was nearly deemed inexcusable by the express terms of Rule 60. Under the circumstances, we cannot consider Enviro's motion to have been made "within a reasonable time." *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion).

Moreover, Enviro has not adequately explained how the proposed assessment was handled after it was received by its North Salt Lake office. The operator's explanation is that "the position of Safety Manager was in transition with a new Dept. Manager being appointed," and that office personnel not familiar with MSHA procedures assumed that notices from MSHA were "bills" and paid the proposed penalty "accidentally." Mot. to Reopen. We note that the proposed assessment was received by Enviro on April 2, 2015, that the delinquency notice was dated June 18, 2015, and that the payment check was dated June 23, 2015. Obviously, the "bill" was the delinquency notice. Enviro's explanation that the position of Safety Manager was in transition does not account for the nearly three months during which the proposed assessment was mishandled.[1]

[1] It is not clear that Enviro understood what had happened even as of the time its motion to reopen was filed. The motion claims that the meeting with MSHA which it had requested was "never scheduled," although MSHA records show that a meeting by telephone took place on February 19, 2015, shortly after the two citations were issued. Moreover, the motion to reopen requests that both Citation Nos. 8869484 and 8869483 be reopened, although Citation No. 88869484 was vacated by MSHA as a result of the telephonic meeting, and was not included in the subsequent proposed assessment.

Accordingly, we deny Enviro's motion to reopen, on the basis of the lengthy unexplained delay in filing the motion, as well as the failure to provide a coherent explanation of why the proposed assessment was not timely contested.

William I. Althen, Acting Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen Jr., Commissioner

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