FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2016-22-M
v.	:	A.C. No. 15-00013-190469
ROGERS GROUP, INC.	:	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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. (2012) ("Mine Act"). On August 31, 2015, and September 25, 2015, the Commission received from Rogers Groups, Inc. ("Rogers") motions 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).[1] The Secretary opposed these motions.

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

[1] The present motions represent Rogers' second and third requests that the Commission reopen Assessment No. 000190469. On January 12, 2010, the Commission dismissed the first motion to reopen without prejudice. *Rogers Group, Inc.*, 32 FMSHRC 8 (Jan. 2010).

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 the proposed assessment was delivered on July 15, 2009, and became a final order of the Commission on August 14, 2009.

On September 1, 2009, Rogers' safety manager, Karonica Glover, filed the initial motion to reopen this matter. Glover justified Rogers' failure to timely contest the assessment by stating she was unaware that multiple citations issued during a single inspection had been placed in two separate dockets. On January 12, 2010, the Commission issued an Order concluding that proffered explanation was not sufficiently detailed and did not provide an adequate basis to reopen, denying the motion without prejudice, and inviting Rogers to file another request to reopen with supporting documentation establishing good cause for the failure to timely contest the citations.

According to Ed Elliott, Rogers' Director of Safety and Health, Glover took no action in response to the Commission's Order and did not inform the operator about her activities in this matter. Elliott stated that he believed that she was engaged in ongoing "informal contest procedures" with MSHA. On March 26, 2010, Glover left her employment with Rogers and her files, including records regarding the previous request to reopen, were "somehow lost." Elliott asserts that after she left, no one else was aware of any of the actions that Glover had taken, nor was anyone aware that the Commission had issued an order denying the original motion to reopen.

However, by the operator's own admission, at least one Rogers employee was aware that Glover had filed the original motion to reopen and that, as of January 2010, the motion was being considered by the Commission. On December 1, 2009, MSHA answered an inquiry by Rogers' Safety and Health manager, Kellyann Krause, by telling her that the case was "on hold' because it "received [a] motion to re-open [Assessment No. 000190469] and [was] awaiting approval from the FMSHRC to process [sic] for hearing." *Operator's Response to Opposition* at 2. In January 2010, MSHA further explained that the Secretary could not proceed with the case until the Commission had ruled on the motion. *Id.*

Despite knowing that a motion to reopen had been filed with the Commission, Rogers' does not appear to have made any effort in the intervening years to request a status update from the Commission. Instead, the operator attempted to revive the final order through informal discussions with MSHA representatives. On September 9, 2010, Krause asked whether the instant matter could be included in that settlement and was told "it could not be included because it was part of a back log [sic] sent to Atlanta." *Operator's Response to Opposition* at 2. Further, in 2014 and again in early 2015, Elliott spoke informally with the MSHA Southeastern District Manager and the Southeast Assistant District Manager about ways that the operator could proceed with the case.

On August 31, 2015, Rogers received a delinquency notice related to the matter.[2] Elliott believed that this notice had been issued in error because the operator had not concluded its contest "according to normal procedures." After consulting with the MSHA Assistant District Manager and the Civil Penalty Compliance Office, Elliott filed the two letters to the Commission, which we have construed as motions to reopen.

In these letters, Rogers does not address its initial failure to file its contest in a timely manner, nor does it mention the motion to reopen previously filed by Ms. Glover. Instead, Rogers offers several justifications for not having filed the present motion to reopen timely. Rogers claims that it thought that Glover had initiated informal contest proceedings and that the case remained pending. However, Rogers also claims to have had no knowledge of any of the actions Glover had taken because she had not informed her superiors, was no longer with the company, and all of her correspondence had been lost. Additionally, Rogers contends that it had mistakenly believed that the citations "might" have been included in a 2015 global settlement consisting of a substantial number of outstanding penalties.

On October 26, 2015, the Secretary filed an opposition to Rogers' request to reopen. The Secretary asserted that the operator's late filing is without adequate excuse and that the request to reopen must be denied because it was filed more than one year after the proposed assessment became a final order of the Commission. Moreover, the Secretary contends that Glover, who left Rogers' employment roughly two months after the Commission's order was issued, would have had plenty of time to refile her motion to reopen.

On December 9, 2015, Rogers filed a Response alleging that the "the government took inappropriate action without our having the opportunity to exercise our rights to contest." In it, Rogers takes exception to the fact that MSHA's Mine Data Retrieval database consistently stated that the matter was "pending" or "on hold." Rogers asserts that it relied on these representations and that it believed that the case would be reopened and that the operator was simply "waiting for the next step."

When we initially dismissed this matter without prejudice, we concluded that "the operator has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment." 32 FMSHRC 8. We went on to explain that, if Rogers submitted another request to reopen, it would be required to show "good cause" for its failure to contest the citations and penalties within 30 days. We noted that under Rule 60(b) of the Federal Rules of Civil Procedure that "good cause" could be established by a number of different factors, including mistake, inadvertence, surprise, excusable neglect, the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party.

Seven years, two requests to reopen, and a response later, the operator has still not provided any additional explanation or established good cause for its initial delay in contesting

[2] The Secretary explained the delay in the issuance of the delinquency notice, stating, "MSHA originally put a hold on sending the delinquency notice because of the pending motion to reopen and then the possible resubmission after the January 2010 denial order, and the system did not pick up the outstanding delinquency until August 2015." *Secretary of Labor's Opposition to Request to Reopen Penalty Assessment* at 3.

this matter. In its three filings in 2015, Rogers provided justifications for why it took no action following the Commission's initial Order denying its request without prejudice. However, it never provided any explanation for why it failed to contest this matter before August 14, 2009, beyond its statement that it was not aware that citations from a single inspection were placed in two dockets. As we noted in our January 12, 2010 Order, this is not "good cause" for failing to contest a citation. At best, it is evidence that Rogers had not properly trained its employees and thus had an inadequate or unreliable internal processing system, which is not a basis for reopening an assessment. *See, e.g.*, *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011). When an operator's second request to reopen following a denial without prejudice again fails to explain its failure to timely contest the proposed penalty, the request should be denied. *See Byholt, Inc.*, 34 FMSHRC 2875 (Nov. 2012); *Pinky's Aggregate, Inc.*, 32 FMSHRC 790 (Jul. 29, 2010).

However, even if Rogers had presented evidence of "good cause" in any of its three 2015 filings, we would still deny the operator's request. The Commission has held that a second request to reopen filed after a denial without prejudice must be made "within a reasonable time." *See WKJ Contractor's Inc.*, 32 FMSHRC 45 (Jan. 2010) ("WKJ"); *see also SOL v. Thomas Hale*, 17 FMSHRC 1815 (Nov. 1995)(Four year delay between final order and request to reopen too long); *SOL v. Ravenna Gravel*, 14 FMSHRC 738 (May 1995) (Commission "constrained" to deny a request to reopen filed more than one year after becoming final). In *WKJ*, the Commission denied a request to reopen when it was made more than a year after the assessment had become final and five months after the initial Order denying without prejudice was issued. *Id.* The instant motion to reopen was filed on September 11, 2015, more than five years after the assessment became final on August 14, 2009 and more than four years after the initial Order denying reopening without prejudice on January 12, 2010. The second request to reopen was not filed within a reasonable time. Further, as in *WKJ*, Rogers offered no adequate reason for this delay.

Rogers provided several explanations for why it failed to resubmit its request to reopen for more than five years. First, Rogers claimed that in December 2009 and January 2010, it was told by MSHA officials that the motion to reopen was pending. Second, it claims that its former safety manager, Karonica Glover, who received the Commission's previous order, left the company on March 26, 2010, and did not leave any records of the Commission's order. Then, in September 2010, Rogers claims that MSHA told it that the matter had been turned over to an Atlanta backlog office. Finally, the operator claims that in the years following its initial request to reopen, the MSHA Mine Data Retrieval website consistently stated that the matter was "pending" or "on hold." However, these explanations are insufficient to excuse the extremely long delay in this case.

There was nothing misleading or inappropriate about MSHA's comments in in December 2009 and January 2010 (particularly if those comments occurred in early January 2010). At that time, Rogers' initial request to reopen was still pending; our Order was not issued until January 12, 2010. After that date, the Commission mailed the Order to Rogers, which should have cleared up any confusion about the status of the case. Further, the Commission did not simply mail the decision to the parties; it published the opinion at 32 FMSHRC 8. Even if MSHA was later unclear about the status of the case, the operator should have possessed the Order and been

aware that it needed to promptly resubmit a request to reopen. The fact that Ms. Glover left the company on March 26, 2010, does not explain what happened during the period of over two months following her receipt of the Commission's January 12, 2010, order. Her failure to take the appropriate action or inform her superiors of the status of the case is not an acceptable excuse for the operator's failure to resubmit the motion in a timely manner. After all, "[i]t is the operator's responsibility to properly train all personnel who handle proposed assessments." *Kentucky Fuel Corp.*, 38 FMSHRC 632, 634 (Apr. 2016).

Even if the operator was misled by MSHA's statements and website, it provides no reasonable explanation for why it failed to actively follow up on this matter between September 2010 and 2014. Regardless of whether Rogers believed the matter was "pending" or "on hold," it should have been diligently pursuing its case. The fact that there is no record of any conversations between the operator and MSHA for approximately four years indicates Rogers was not diligent.

Properly contesting citations and orders, managing and supervising its personnel and providing appropriate justification and support for a request for extraordinary relief are the operator's responsibilities. They have not been fulfilled by the unreasonably delayed and incomplete explanations submitted to us in the instant motion. We therefore deny the motion.

William I. Althen, Acting Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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