

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 20, 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 THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). 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 three 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). On January 9, 2009, the Commission denied the motions. *Left Fork Mining Co.*, 30 FMSHRC 8, 11 (Jan. 2009). On January 22, 2009, Left Fork filed a petition to reconsider the denial of its motions.

In August and October 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Penalty Assessment Nos. 000125861, 000127886, and 000130206 to Left Fork, which listed proposed penalties for several citations. Left Fork failed to timely contest various penalties associated with those proposed penalty assessments as required by section 105(a) of the Mine Act. As a result, the proposed penalties were deemed final orders of the Commission.<sup>1</sup>

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<sup>1</sup> 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

In November and December 2007, and January 2008, MSHA issued a Notice of Delinquency to Left Fork pertaining to each of the proposed penalty assessments. On May 13, 2008, counsel for MSHA sent Left Fork a letter pertaining to the delinquencies of all three proposed assessments, stating 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 with 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 and June 20, 2008, the Commission received Left Fork's requests to reopen the penalty assessments that had become final Commission orders. In its requests to reopen, Left Fork's counsel had stated that, upon receipt of the subject 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 further stated 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, 2008, the Commission received responses to Left Fork's pleadings from the Secretary. The Secretary opposed the requests on the basis that the operator's conclusory assertion was insufficient to establish exceptional circumstances that warrant reopening. She further stated 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 maintained that the operator's filing of requests to reopen only when facing enforcement action did not demonstrate good faith.

On July 22, 2008, the Commission received a reply to the Secretary's responses from Left Fork. Left Fork asserted that it did, in fact, explain how or why a mistake occurred at the Brookside office. It stated 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. In addition, Left Fork contended that a delinquency notice is not proof of default. It explained that MSHA's May 13 letter listed two assessments (Nos. 000120903 and 000134705) which were not delinquent. It also stated that after it paid the subject proposed assessments, it received delinquency notices demanding payment.

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is deemed a final order of the Commission. 30 U.S.C. § 815(a).

On January 9, 2009, the Commission issued its denial of Left Fork's requests, concluding that Left Fork failed to make a showing of circumstances that warrant reopening. 31 FMSHRC at 11. The Commission explained that Left Fork's statements that its failure to timely file its contest of the proposed penalty assessments due to "inadvertence or mistake" did not provide the Commission with an adequate basis to justify reopening. *Id.* at 10. It noted that 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." *Id.* In addition, the Commission stated that Left Fork failed to explain its failure to act after receiving MSHA's delinquency notices. *Id.* It noted that Left Fork did not seek relief until it faced enforcement action, including potential mine closure. *Id.* at 10-11.

In its petition for reconsideration, Left Fork offers to further explain the circumstances related to its failure to contest the proposed penalty assessments and its delay in seeking relief. The operator states that its safety director had requested that a clerical employee return the assessments as contested, but that "apparently" this did not happen. Left Fork states that "the precise reasons are not known, but it was apparently an oversight." It notes that the clerical employee also believed that the penalties had been contested, as evident in her letter to MSHA dated January 18, 2008, indicating that the assessments had been contested. In addition, Left Fork explains that it did not seek relief after receiving the delinquency notices because it has previously received incorrect delinquency notices from MSHA, and that delinquency notices do not necessarily mean that payments have not been made or that matters have not been properly contested. It also refers to MSHA's May 13 letter which it states "cites several penalties which were not delinquent." Left Fork asserts that it was only when it received a notice threatening to shut down Left Fork's mine did it become apparent that the assessments had not been properly contested. Left Fork attached additional evidence to its petition.

The Secretary opposes Left Fork's petition for reconsideration. She argues that Left Fork has advanced no reasons justifying reconsideration. The Secretary submits that a petition for reconsideration may not be used to relitigate old matters, raise arguments, or present evidence that could have been raised prior to the entry of judgment. She contends that Left Fork identifies no material factual or legal issue that could not have been fully considered by the Commission at the time Left Fork filed its motions to reopen. Accordingly, the Secretary requests that the Commission deny Left Fork's petition for reconsideration.

The Commission has recognized that petitions for reconsideration under Commission Procedural Rule 78 "ought, at the very least, to bring to the Commission's attention facts or legal arguments the petitioner believes were overlooked or misapprehended, or point to a change in controlling law." *Island Creek Coal Co.*, 23 FMSHRC 138, 139 (Feb. 2001) (citations omitted). The Commission stated that such petitions "should also not merely raise arguments the Commission has already considered, or attempt to raise new legal arguments." *Id.* (citations omitted). Courts have recognized that the basis for a motion for reconsideration must not have been available at the time the first motion was filed. *Servants of the Paraclete v. Does*, 204 F.3d

1005, 1012 (10th Cir. 2000). In other words, a motion for reconsideration must fail when the motion merely advances “new arguments, or supporting facts which were available at the time of the original motion.” *Id.*

Here, Left Fork has failed to set forth reasons justifying reconsideration. In arguing that it has previously received incorrect delinquency notices and that delinquency notices do not necessarily mean that proposed penalties have not been contested, Left Fork essentially raises an argument that the Commission considered in disposing of Left Fork’s motions to reopen.<sup>2</sup> In addition, although Left Fork presents more detailed information concerning its failure to timely contest the proposed penalty assessments and its delay in filing the motions to reopen, there is no indication that such evidence was not also available at the time that Left Fork filed its motions to reopen.

Accordingly, for these reasons, Left Fork’s petition for reconsideration is denied.

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Michael F. Duffy, Chairman

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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

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<sup>2</sup> We note that Proposed Assessment Nos. 000120903 is referred to as paid in a “Civil Penalty Collection Report” attached to MSHA’s May 13 letter.

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