FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

June 20, 2014

SECRETARY OF LABOR,	:	Docket No. SE 2012-226-M
MINE SAFETY AND HEALTH	:	A.C. No. 01-02947-277361
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2012-560-M
	:	A.C. No. 01-02947-291433
	:	
	:	Docket No. SE 2013-525-M
	:	A.C. No. 01-02947-308350
	:	
	:	Docket No. SE 2013-526-M
v.	:	A.C. No. 01-02947-318268
	:	
	:	Docket No. SE 2013-527-M
ALABAMA MARBLE COMPANY, INC.	:	A.C. No. 01-02947-321067

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

ORDER

BY: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On July 26, 2013, the Commission received from Alabama Marble Company ("AMC") a motion seeking to reopen a penalty assessment proceeding and relieve the operator from the Default Order entered against it, reopen a Decision Approving Settlement, and 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).[1]

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that in Docket No. SE 2012-226-M, Chief Administrative Law Judge Robert J. Lesnick issued on October 24, 2012, an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. The Commission did not receive AMC's

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers SE 2012-226-M, SE 2012-560-M, SE 2013-525-M, SE 2013-526-M, and SE 2013-527-M, all captioned *Alabama Marble Company, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

answer within 30 days, so the default order became effective on November 26, 2012. The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). MSHA mailed a delinquency notice on March 20, 2013.

In Docket No. SE 2012-560-M, Administrative Law Judge Thomas P. McCarthy issued a Decision Approving Settlement on March 20, 2013. Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the judges' Order and Decision here have become final orders of the Commission.

In Docket No. SE 2013-525-M, the proposed assessment was delivered on December 10, 2012, and became a final order of the Commission on January 9, 2013. MSHA mailed a delinquency notice on February 25, 2013. In Docket No. SE 2013-526-M, the proposed assessment was delivered on April 17, 2013, and became a final order of the Commission on May 17, 2013. MSHA mailed a delinquency notice on July 2, 2013. In Docket No. SE 2013-527-M, the proposed assessment was delivered on May 15, 2013, and became a final order of the Commission on June 14, 2013.

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. *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

AMC asserts that it delegated the contest responsibility to a third party and recently discovered that "nothing was ever done to contest and defend the charges." Mot. at 1. The Secretary of Labor opposes the requests to reopen and asserts that the operator identified no exceptional circumstances warranting reopening. The Secretary notes that this operator has been in business for many years and is familiar with MSHA procedures. The Secretary further states that the inadequate monitoring of MSHA assessments and lack of communication between the

operator and its representative indicates an inadequate and unreliable processing system. In light of the operator's claim of financial difficulties, the significant amount of proposed assessments, totaling almost $80,000, should have made the operator more diligent in pursuing a possible appeal.

In response to the Secretary's opposition, AMC explains that it hired a representative and regularly paid him for the work it believed he was doing in these cases. AMC asserts that it is having financial difficulties and could not afford to hire an attorney. Therefore, it relied on the work of the representative and agreed to temporarily make payments in order to avoid further penalties and collection charges.

Having reviewed AMC's request and the Secretary's response, we conclude that AMC had an opportunity to be heard in Docket No. SE 2012-560-M, we therefore deny its motion to vacate the Decision Approving Settlement. In the interest of justice, we hereby vacate the Default Order in Docket No. SE 2012-226-M, and reopen the proposed penalty assessments in Docket Nos. SE 2013-525-M, SE 2013-526-M, and SE 2013-527-M. Accordingly, Docket Nos. SE 2012-226-M, SE 2013-525-M, SE 2013-526-M, and SE 2013-527-M are 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. Consistent with Rule 28, the Secretary shall file petitions for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

Commissioner Cohen concurring in part and dissenting in part:

On July 26, 2013, Alabama Marble filed a motion requesting that the Commission (1) vacate a Decision Approving Settlement, (2) reopen three cases involving citations that had become final orders because Alabama Marble neglected to contest their respective penalty assessments, and (3) vacate an Order of Default entered after it failed to file an Answer to a penalty petition. Alabama Marble contends that the motions should be granted because the consultant and attorney it hired to represent it in proceedings under the Mine Act failed to take adequate steps to "contest and defend the charges." Mot. at 1-2.

For the reasons that follow, I dissent from my colleague's conclusions in part. I would deny Alabama Marble's motion to reopen the cases docketed as SE 2013-525-M and SE 2012-226-M and remand these proceedings to the Chief Administrative Law Judge for further fact-finding.

1) The motion to vacate the Decision Approving Settlement of the case docketed as SE 2012-560-M.

On February 12, 2013, the Secretary filed a motion to approve a settlement agreement for the case docketed as SE 2012-560-M and represented that "[Alabama Marble] has reviewed this motion, [and] has agreed to its terms." Mot. at 1. Alabama Marble did not indicate any disagreement with this statement. On March 20, 2013, a Judge issued a Decision Approving Settlement.

Because Alabama Marble consented to the underlying settlement agreement, I agree with the majority's decision to deny the motion to vacate the Decision Approving Settlement.

2) The motion to reopen the cases docketed as SE 2013-525-M, SE 2013-526-M, and SE 2013-527-M.

The cases docketed as SE 2013-525-M, SE 2013-526-M, and SE 2013-527 became final after Alabama Marble failed to timely contest the Secretary's proposed penalty assessments for the subject citations. Alabama Marble filed its motion to reopen these cases on July 26, 2013. The motion was filed shortly after the Secretary issued a notice of delinquency for the case docket as SE 2013-526-M (July 2, 2013), and shortly after the case docketed as SE 2013-527-M became final (June 14, 2013). Because the record demonstrates that the operator reacted promptly after it learned that the proposed assessments were mistakenly ignored, I conclude that there is adequate cause to reopen these two proceedings.

However, Alabama Marble did not show the same expeditiousness in its request to reopen the case docketed as SE 2013-525-M. In this case, a delinquency notice was mailed on February 24, 2013, a full five months prior to the filing of the motion to reopen.

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, the Commission considers the amount of time that passes between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *Highland Mining Co.*, 31 FMSHRC 1313, 1316 (Nov. 2009); *Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009).

I conclude that Alabama Marble's motion lacks sufficient details to establish the extenuating circumstances necessary to justify the reopening of the case docketed as SE 2013-525-M.

3) The motion to vacate the Order of Default issued for the case docketed as SE 2012-226-M.

Alabama Marble timely contested the proposed assessment issued for the citation at issue in the case docketed as SE 2012-226-M. However, it subsequently failed to file an Answer to the Secretary's Penalty Petition as required by Commission Procedural Rule 29, 29 C.F.R. § 2700.29. On October 24, 2012, the Chief Administrative Law Judge issued an Order to Show Cause stating that Alabama Marble would be in default if it failed to file an Answer within 30 days. Alabama Marble again failed to file an Answer. On March 20, 2013, the Secretary mailed a notice to delinquency to Alabama Marble.

Alabama Marble waited an additional four months after receiving the notice of delinquency to file the motion to vacate the Order of Default. The operator's motion fails to provide details that justify its significant delay. Accordingly, I conclude that Alabama Marble has failed to demonstrate good cause to vacate the default order.

Conclusion

In summation, I concur with the majority's denial of the motion to vacate the Decision Approving Settlement issued for the case docketed as SE 2012-560-M and its grant of the motion to reopen the proceedings docketed as SE 2013-526-M and SE 2013-527-M.

However, I conclude that Alabama Marble has failed to establish that its delay in filing a motion to reopen the cases docketed as SE 2013-525-M and SE 2013-226-M was reasonable. While Alabama Marble faults a consultant and an attorney it hired for the defaults, it does not account for its failure to act for five and four months respectively, after receipt of multiple documents from the Secretary which stated that further action was necessary on its part.

Therefore, I would remand the cases docketed as SE 2013-525-M and SE 2012-226-M to the Chief Administrative Law Judge for further fact-finding regarding the cause of the delay in filing the motions to reopen.

Robert F. Cohen, Jr., Commissioner

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