June 2024

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Secretary of Labor obo Robert Baumann v. MOsenecaManufacturer, LLC, dba American Tripoli, Docket No. CENT 2023-0251, Judge Moran (May 23, 2024)

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

June 3, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2023-0313 A.C. No. 05-04889-577315
HOLCIM – WCR, INC.	

BEFORE: Jordan, Chair; Althen, Rajkovich, Baker, and Marvit, 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. (2018) ("Mine Act"). On July 13, 2023, the Commission received from Holcim-WCR, Inc. ("Holcim") 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), 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).

The Department of Labor's Mine Safety and Health Administration ("MSHA") indicates that the proposed assessment was delivered to the operator on May 22, 2023. The assessment became a final order of the Commission on June 21, 2023.

Holcim asserts that its internal office procedure requires routing of proposed civil penalty assessments to its Regional Health and Safety Manager for evaluation and contest determinations. It contends that the assessment here was not routed to the Safety Manager upon receipt due to an inadvertent internal routing error. Holcim learned of the proposed civil penalty assessment on June 28, 2023, when the Safety Manager saw the assessment on MSHA's data retrieval system. The operator maintains that it was intending to contest Order No. 9729218 and the associated civil penalty. It states that it began the process to reopen the order prior to any notification from MSHA and as soon as the mistake was discovered. Holcim also claims that it took steps to modify its internal routing procedure to streamline the procedure and to prevent routing errors in the future. The operator argues that surrounding circumstances demonstrate that its failure to timely contest was "the result of an inadvertent and rare routing error and oversight." Holcim MTR at 4. It also contends that no one will be prejudiced by acceptance of a late contest in this case as the delay is not significant.

The Secretary opposes the motion arguing that not only did Holcim miss the deadline to contest the specific order, but it also neglected to pay the penalty amounts for all five citations contained in the assessment.[1] She states that as a mine operator, Holcim should be familiar with the processing of proposed assessments—especially when they involve significant and substantial ("S&S") violations. The Secretary argues that the operator's failure, which took more than a month to discover, is not excusable neglect and the assessments must be taken seriously and handled with care. She contends that Holcim's reason that its failure was the result of an "internal routing error" is vague and gives no explanation as to why it was a routing error, or how it happened. In addition, Holcim does not explain what changes were made to fix the error, and what procedures will be employed to ensure proper and timely handling of MSHA communications in the future. The Secretary maintains that Holcim has failed to provide a viable justification for its failure to timely contest the assessment, thus, its motion should be denied without prejudice.

[1] The operator has since paid the associated civil penalties.

Here, Holcim discovered its error by proactively checking MSHA's mine data retrieval system and immediately moved to reopen the case within 30 days of the final order. The operator also does not have a lengthy history of filing motions to reopen. Therefore, having reviewed Holcim's request and the Secretary's response, we find that due to an administrative error, the penalty assessment was not timely contested. In the interest of justice, we hereby reopen this matter and remand it 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. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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June 3, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. R.J. VALENTE GRAVEL, INC.	Docket No. YORK 2023-0115 A.C. No. 30-03434-578738

BEFORE: Jordan, Chair; Althen, Rajkovich, Baker, Marvit, 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. (2018) ("Mine Act"). On August 9, 2023, the Commission received from R.J. Valente Gravel, Incorporated ("Valente") 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), 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).

The Department of Labor's Mine Safety and Health Administration ("MSHA") indicates that delivery of the proposed assessment was attempted on June 14, 2023. The assessment became a final order of the Commission on July 14, 2023.

Counsel for Valente states that on July 26, 2023, it checked the status of the penalty assessment for Citation No. 9713937 and learned that a penalty had been assessed on June 8, 2023. He then contacted Valente and was informed that the assessment had been sent directly to the operator instead of counsel. Through inadvertence and mistake, Valente states that it failed to forward the assessment to its counsel and failed to contest it. Counsel argues that Valente clearly intended to contest the assessment as evidenced by its pre-penalty Notice of Contest for related Citation No. 9713937, Docket No. YORK 2023-0085. Valente acted quickly after learning of the assessment and within 30 days filed its motion to reopen.

The Secretary opposes Valente's motion to reopen. She claims that the operator has a significant history of delinquent penalty payments and maintains that these actions do not demonstrate that Valente is acting in good faith. She argues that the motion to reopen should be denied with prejudice because the operator has failed to show good cause and it did not meet the requirements of Rule 60(b) of the Federal Rules of Civil Procedure nor the Commission's requirements for obtaining reopening.

A review of Valente's record shows that it does not have a significant history of filing motions to reopen. Additionally, upon learning of the assessment, Valente filed the motion to reopen within 30 days. Having reviewed the operator's request and the Secretary's response, we find that due to an administrative error, the penalty assessment was not timely contested. In the interest of justice, we hereby reopen this matter and remand it 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. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Finally, Valente filed a motion to strike the Secretary's opposition of its motion to reopen arguing that the Secretary initially did not oppose the motion but filed an untimely opposition with no warning to the operator. R.J. Valente Mot. to Strike at 1-2. The Secretary responds that her review of the operator's history of delinquencies motivated her change of position. She further asserts that its opposition was filed four days late due to the time it took to assess the operator's extensive delinquency history. *See* Commission Rule 29 C.F.R. § 2700.10(d) (requiring that statements of opposition to written motions be filed within 8 days after service upon the party). The Secretary contends that her brief delay has not prejudiced Valente nor has the operator established prejudice to justify dismissing the Secretary's opposition. Sec'y Opp. to Mot. to Strike at 1-2. Upon consideration of Valente's motion to strike and the Secretary's Opposition, we deny the operator's motion.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

/s/ Moshe Z. Marvit
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June 11, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. SE 2023-0127 A.C. No. 40-00130-575069
v.	Docket No. SE 2024-0156 A.C. No. 40-00130-575069
DYNO NOBEL	

BEFORE: Jordan, Chair; Althen, Rajkovich, Baker, and Marvit, Commissioners

ORDER

BY: Jordan, Chair; Althen and Rajkovich, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On June 24, 2023, the Commission received from Dyno Nobel 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).[1]

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).

[1] The motion to reopen was erroneously filed under the docket number assigned to the related contest proceeding rather than being assigned a separate civil penalty proceeding docket number. We have corrected this docketing error, and the correct docket number appears in the caption of this order. We hereby consolidate Docket Nos. SE 2023-0127 (contest proceeding) and SE 2024-0156 (civil penalty proceeding) because they both involve contests relating to Citation No. 9420749. 29 C.F.R. § 2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the U.S. Postal Service ("USPS") attempted delivery of the proposed assessment to Dyno Nobel's address of record on April 22, 2023. On April 28, 2023, USPS marked the assessment package "Return to Sender Processed – Moved, Left no Address." The assessment became final on May 22, 2023. Dyno Nobel filed a motion to reopen on June 24, 2023, and the Secretary mailed a delinquency letter on July 7, 2023.

Dyno Nobel asserts the assessment was not timely contested due to administrative mistake and inadvertence. Dyno Nobel states that it timely contested the underlying citation on March 14, 2023. On or about June 15, the contractor realized it had not received a proposed assessment for the citation, learned the penalty had become final, and promptly filed a motion to reopen. Dyno Nobel was ultimately unable locate the assessment package or determine how or when the package was delivered, and notes that it does not maintain a permanent presence at the mine site where the relevant citation was issued.

The Secretary opposes the motion to reopen. She asserts that Dyno Nobel did not receive the assessment package because it failed to update its address of record with either MSHA or USPS. She notes that the assessment package was mailed to the contractor's address of record on file with MSHA, but USPS was unable to complete delivery because the contractor had moved without providing a forwarding address. The Secretary emphasizes the importance of maintaining an up-to-date address of record for independent contractors (30 C.F.R. § 45.5), and states that Dyno Nobel's failure to fullfill its legal responsibility does not constitute excusable neglect warranting reopening.

Documentation provided by the Secretary shows that Dyno Nobel failed to update its address. However, the record also shows that Dyno Nobel has expressed a clear intent to contest the citation. *See Carmeuse Lime & Stone, Inc.*, 45 FMSHRC 179, 180 (Apr. 2023) (crediting the operator for initiating contest proceedings as indicia of intent to contest). Additionally, Dyno Nobel proactively sought out information on the penalty assessment, and promptly filed a motion to reopen upon learning the assessment had become final. Notably, Dyno Nobel filed its motion less than two weeks after learning of the assessment, and two weeks *prior* to the Secretary's issuance of a delinquency letter. *See Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 ("[m]otions 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 be presumptively considered as having been filed within a reasonable amount of time"). It also appears Dyno Nobel has successfully filed changes of address prior to 2015, indicating that the failure to update its address was a single inadvertent failure to act rather than a repeated error.

Having reviewed Dyno Nobel's request and the Secretary's response, we find that Dyno Nobel's failure to timely respond to the penalty assessment was the result of excusable inadvertence in this instance. *See ITAC*, 46 FMSHRC 80 (Feb. 2024) (reopening where an assessment was mailed to an out-of-date address of record, the operator proactively checked the former address for missing packages, contacted MSHA within a day of learning of its error, and filed to reopen within 30 days of discovering the assessment). However, we note that a *repeated* failure to update one's address of record would likely indicate an inadequate internal process, and may result in future motions to reopen being denied.

In the interest of justice, we hereby reopen this matter and remand it 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. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

Commissioners Baker and Marvit, dissenting:

We respectfully dissent.

In the instant case, undisputed records indicate that MSHA's assessment was delivered to Dyno Nobel's address of record on April 22, 2023. On April 28, 2023, USPS marked the assessment package "Return to Sender Processed – Moved, Left no Address." The assessment became final on May 22, 2023. Dyno Nobel's excuse for its failure to respond to the proposed assessment in a timely manner is that it never received the assessment. However, the Secretary noted that the operator did not receive the assessment because it failed to update its address of record with either MSHA or USPS.

Section 109(d) of the Mine Act requires each operator of a coal or other mine to file with the Secretary of Labor the name and address of such mine, the name and address of the person who controls or operates the mine, and any revisions in such names or addresses. 30 U.S.C. § 819(d). Under the authority granted by the Act, the Secretary has promulgated regulations requiring an operator to provide MSHA with, among other things, its correct address of record. 30 C.F.R. § 41.11. If any changes occur with respect to this information, an operator is required to notify MSHA of the change within 30 days of its occurrence. 30 C.F.R. § 41.12. Any failure by an operator to notify MSHA in writing of a change is considered a violation of Section 109(d) of the Act and subject to a civil penalty as provided in section 110 of the Act.[2] 30 C.F.R. § 41.13. In essence, Dyno Nobel's argument is that the case should be reopened because it failed to follow the statutory and regulatory requirements under the law.

The Commission has previously denied motions to reopen, in part, because the operator failed to maintain its correct address of record. *See Southwest Rock Prod., Inc.*, 45 FMSHRC 747, 748-49 (Aug. 30, 2023); *see also ITAC*, 46 FMSHRC 80, 83 (Feb. 2024) (Baker, dissenting). In addition, the Commission has previously held that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *See*, *e.g.*, *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010).

[2] The regulations further provide:

> Service of documents upon the operator may be proved by a post office return receipt showing that the documents could not be delivered to such address of record because the operator had moved without leaving a forwarding address or because delivery was not accepted at that address, or because no such address existed.

30 C.F.R. § 41.30; *see also* 30 C.F.R. § 45.6 (applying this same rule to independent contractors).

The operator's failure to update its address of record does not constitute excusable neglect. In fact, the explanation is itself an independent violation of the Mine Act that could have been cited. Rather than excuse the operator's failure to timely contest the citation, it compounds the error. We note that the Secretary opposes reopening.

Therefore, we would find that Dyno Nobel failed to establish good cause and we would deny Dyno Nobel's motion to reopen.

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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June 11, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. RAMACO RESOURCES, LLC	Docket No. WEVA 2023-0479 A.C. No. 46-09602-573037

BEFORE: Jordan, Chair; Althen, Rajkovich, Baker, and Marvit, Commissioners

ORDER

BY: Jordan, Chair; Rajkovich, Baker, and Marvit, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On August 7, 2023, the Commission received from Ramaco Resources, LLC ("Ramaco") 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).[1]

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).

[1] Of the 38 citations listed in the relevant assessment, Ramaco seeks to reopen the following 11 citations: Nos. 9567490, 9567492, 9567499, 9592600, 9592603,9592608, 9592610, 9592613, 9592614, 9592619, and 9592620.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on March 29, 2023, and became a final order of the Commission on April 28, 2023. Ramaco asserts that the assessment was not timely contested because it was not timely received by the Vice President of Safety. Ramaco was unable to identify the specific incident that delayed receipt, but notes that the safety department experienced significant employee turnover around the relevant time.[2] Ramaco also notes that it has subsequently conducted additional training for the new employees, and states that its low rate of filing motions to reopen indicates normally adequate policies and procedures.

The Secretary opposes the motion. The Secretary states that Ramaco's explanation is insufficient to justify relief, as the operator failed to identify a specific error, and that a failure to properly train personnel is not an excusable mistake. The Secretary also asserts that Ramaco's previous filing of a motion to reopen on May 18, 2023 indicates a pattern of failures to timely respond to assessments.

A party seeking to reopen a final penalty bears the burden of showing that it is entitled to such relief, through a detailed explanation of its failure to timely respond. *Revelation Energy, LLC*, 40 FMSHRC 375, 375-76 (Mar. 2018). General assertions or conclusory statements are insufficient. *Southwest Rock Prod., Inc.*, 45 FMSHRC 747, 748 (Aug. 30, 2023); *B & W Res., Inc*., 32 FMSHRC 1627, 1628 (Nov. 2010). At a minimum, the applicant 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. *Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010).

Here, Ramaco has failed to identify the error that resulted in a failure to timely contest the assessment. The operator suggests it was likely due to staff turnover, but has failed to provide any details regarding the change in personnel or how it contributed to the processing delay. *See Sun West Acquisition Corp*, 45 FMSHRC 141 (Mar. 2023) (finding insufficient justification where an operator alleged loss of staff but failed to provide additional detail);

[2] Our dissenting colleague draws unreasonably tenuous inferences from the pleadings and presents them as fact. For example, the dissent states that Ramaco was experiencing "unusually high levels of staff turnover," and that the cause of the mistake was due to the new employees not sending the proposed assessment through the proper channels. However, Ramaco's pleadings and attached affidavits are careful to state that the operator could not determine the cause of the error, that it was "an error of unknown origin." The D.C. Circuit has recently admonished this Commission for trying to resolve cases sua sponte "on grounds that were not raised or litigated by the parties and pursuant to findings not supported by the record." *MSHA v. Westfall Aggregate and Materials*, 69 F. 4th 902, 912 (D.C. Cir. 2023). Furthermore, the fact that Ramaco filed its Motion to Reopen prior to receiving a delinquency notice does not "compel a finding of good faith" as our colleague contends. MSHA's records of Ramaco's delinquent penalties in the months prior to the filing of the instant Motion to Reopen, as pointed out by the Secretary, could lead one to draw a different conclusion. *See* Sec'y Resp. Br. at 3-5.

Revelation Energy LLC, 39 FMSHRC 1777 (Sept. 2017) (finding insufficient justification where a document was misplaced due to changes in personnel). We find Ramaco's explanation insufficient to justify relief.[3]

Having reviewed Ramaco's request and the Secretary's response, we find that the operator has not provided sufficient explanation to justify reopening the captioned proceeding. Accordingly, we deny Ramaco's motion.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

[3] We also note that Ramaco has not provided any detail regarding the three-month delay in filing its motion to reopen. The operator simply states that it retained counsel to file the motion immediately upon becoming aware of the issue, without specifying when or how it learned of the issue. However, while the motion was filed three months after the assessment became final, it was filed two weeks *before* the Secretary mailed a delinquency notice (August 25, 2023). In this unusual circumstance, the motion could be considered to have been filed within a reasonable amount of time. *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (motions received within 30 days of an operator's first notice from MSHA it has failed to timely contest will be presumptively considered to be filed within a reasonable amount of time). Regardless, for the reasons above, we find Ramaco has failed to justify its entitlement to relief.

Commissioner Althen, dissenting:

I respectfully dissent.

This motion to reopen involves an attempt by Ramaco to challenge 11 citations totaling over $44,000 in proposed penalties.

Although the precise nature of the error could not be determined, the facts are not contested. In March of 2023, Ramaco states that it was experiencing unusually high levels of staff turnover. As a result, newly hired employees were processing proposed assessments. Normally, administrative staff would scan incoming proposed assessments and forward them to the company's Vice President of Safety, who determines which citations to contest. However, in this instance, the new employees did not send the proposed assessment through the proper channels and penalties were not timely contested.

Ramaco discovered its failure, investigated the possible causes, provided further training for its employees, and then on August 7, 2023, it filed a motion to reopen. Ramaco did so without any notification from MSHA that payment was delinquent.[4] In most cases, the Secretary will send operators who fail to contest and pay the assessments a delinquency letter to inform them of the error. However, due to an apparent mistake, MSHA incorrectly recorded the final order date as July 10, 2023 and the delinquency letter was not mailed to the operator until August 25, 2023, weeks after the motion to reopen was filed.

Ramaco proved that it recognized and acted to correct its error prior to receipt of the first notice of delinquency. Just late last year, the Commission reaffirmed a long-established position regarding timely recognition of an error:

> The Commission has held that quick action after recognizing an error militates in favor of reopening. "Motions to reopen received within 30 days of an operator's of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time." *Highland Mining Co*., 31 FMSHRC 1313, 1316-17 (Nov. 2009).

Heidelberg Materials US Cement, LLC, 45 FMSHRC 1004, 1005 (Dec. 2023).

Undoubtedly, Ramaco discovering and attempting to remedy the error on its own initiative, prior to receiving a delinquency notice, compels a finding of good faith. *See, e.g.*, *Alleyton Res. Co.*, 46 FMSHRC ___ (May 17, 2024) (finding the proactive monitoring of citations and promptly moving to reopen upon discovery demonstrated good faith); *St. Marys*

[4] In her opposition, the Secretary provides a short summary of her records concerning the present case. Notably absent from the records is any mention of the Secretary notifying the operator of the delinquent penalties prior to the August 25th delinquency letter. Ramaco also does not indicate in its motion that MSHA notified it of the delinquent penalty, instead stating that the error was "discovered."

Cement, 45 FMSHRC 1008, 1009 (Dec. 2023); *Canyon Fuel Co., LLC*, 40 FMSHRC 1092, 1094 (July 2018).

Recognizing that Ramaco acted with promptness to notify MSHA and the Commission of its desire to contest citations, the majority rests its denial on the claim that Ramaco failed to provide sufficient explanation to justify reopening. However, it is unclear what more information *known to Ramaco* would have satisfied the majority's curiosity. The operator did not simply state that the failure to contest was the result of administrative error. Rather, Ramaco acknowledged that the failure to timely contest was due to a mistake forwarding the proposed assessment to the Vice President of Safety. Ramaco investigated the incident and identified that it was most likely the result of new administrative staff unfamiliar with the process. Any vagueness in the operator's explanation appears not to be for lack of trying but rather the inherent uncertainty in attempting to understand a past mistake.[5]

This case does not reflect poor internal processing or lack of expedition by Ramaco. It is a singular event caused by staff turnover. Moreover, it appears to be the quintessential type of mistake that Rule 60(b) was intended to address. Yet, the majority reviews Ramaco's quick action and finds no difficulty in refusing it the opportunity to contest penalties totaling a very high amount—a harsh remedy indeed.

Accordingly, I would find that Ramaco's failure to timely respond to the assessment was the result of mistake arising from a period of employee turnover, and grant Ramaco's motion to reopen.

/s/ William I. Althen
William I. Althen, Commissioner

[5] The majority relies on two cases to demonstrate that staff turnover is not a sufficient reason to justify reopening. In *Sun West Acquisition Corp.*, 45 FMSHRC 141 (Mar. 2023), the operator's motion was significantly less detailed that the present case. The motion was only three sentences long and only one of the sentences explained the failure to timely contest. In *Revelation Energy LLC*, 39 FMSHRC 1777 (Sept. 2017), the primary justification for denying relief was that the operator failed to respond to the Petition, the Order to Show Cause, and the delinquency notice for a significant amount of time, creating a "pattern of neglect." *Id*. at 1778. No such allegation exists here. Moreover, in *Revelation Energy*, the Commission admonished the operator for failure to explain how it was addressing the problem so that it would not reoccur. In the present case, Ramaco's Vice President of Safety stated in a sworn affidavit that, upon discovery of the error, all safety department employees received additional training on policy and procedures concerning proposed assessments.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 18, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) o/b/o ROBERT BAUMANN	
v.	Docket No. CENT 2023-0251-DM
MOSENECAMANUFACTURER, LLC d/b/a AMERICAN TRIPOLI	

DIRECTION FOR REVIEW

Pursuant to Commission Procedural Rule 71, 29 C.F.R. § 2700.71, and section 113(d)(2)(B) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(d)(2)(B), the undersigned Commissioners vote to grant *sua sponte* review of the Administrative Law Judge's May 23, 2024 decision issued in the above-named case.

Review is directed on the grounds that the decision may be contrary to law. Specifically, we order review of whether the Judge's decision is contrary to law regarding the meanings and applications of the "discrimination" and "interference" provisions in complaints brought pursuant to §105(c) of the Mine Act, 30 U.S.C. § 815(c), and whether the provisions are ambiguous and deserving of deference to the Secretary's interpretation.

The parties shall file briefs in accordance with 29 C.F.R. § 2700.75(a).

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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June 27, 2024

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) o/b/o ROBERT BAUMANN	
v.	Docket No. CENT 2023-0251-DM
MOSENECAMANUFACTURER, LLC d/b/a AMERICAN TRIPOLI	

DIRECTION FOR REVIEW

The petition for discretionary review filed by Mosenecamanufacturer, LLC doing business as American Tripoli ("American Tripoli") on June 21, 2024, is granted. This direction for review shall be combined with the direction for review issued in this case on June 18, 2024. Therefore, the parties shall file their briefs beginning 30 days from the date of this order in accordance with the briefing schedule requirements in 29 C.F.R. § 2700.75.

Specifically, American Tripoli shall file its opening brief addressing all issues raised in the June 18 direction for review and the June 21 petition for discretionary review. The Secretary shall file her response brief 30 days later also addressing all issues raised. The operator shall then file its reply brief 20 days after that.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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ADMINISTRATIVE LAW JUDGE ORDERS

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June 12, 2024

WESLEY MALLERY, Complainant, v. EL SEGUNDO COAL COMPANY, LLC, Respondent	DISCRIMINATION PROCEEDING Docket No. CENT 2024-0106 MSHA Case No. DENV-CD-2023-03 Mine: El Segundo Mine Mine ID: 29-02257

ORDER OF DISMISSAL

Before: Judge Bulluck

This case is before me upon a Discrimination Complaint filed by Wesley Mallery, against El Segundo Coal Company ("El Segundo"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"). 30 U.S.C. § 815(c)(3). El Segundo contends that the case should be dismissed on two bases. For the reasons set forth below, Mallery's Discrimination Complaint is dismissed.

I. Procedural Background

On May 30, 2023, Wesley Mallery filed his Discrimination Complaint against El Segundo with the Mine Safety and Health Administration ("MSHA"). MSHA investigated Mallery's allegations and, by letter dated August 3, 2023, notified Mallery of its determination that the evidence was insufficient to establish a violation of section 105(c). MSHA also advised Mallery of his right to file his discrimination case on his own behalf with the Commission, within 30 days of its notice. On January 19, 2024, Mallery filed his Discrimination Complaint with the Commission.

El Segundo filed its Answer to the Complaint on February 5, 2024, asserting that Mallery neither engaged in any protected activity nor suffered any adverse action. El Segundo Ans. at 11. Additionally, in its Answer, El Segundo requested that Mallery's case be dismissed for his failure to state a claim upon which relief may be granted, and for untimely filing his Discrimination Complaint with MSHA in excess of the 60-day time limit applicable to section 105(c)(2). El Segundo Ans. at 12; *See* 30 U.S.C. § 815(c)(2).

On March 5, 2024, I issued an Order to Show Cause, directing Mallery to show good cause why his Discrimination Complaint should not be dismissed for failure to state a claim upon which relief may be granted, and failure to timely file his Complaint with MSHA and the Commission. That Order explicitly explained to Mallery that his Discrimination Complaint,

including all documents filed with it, is confusing and unclear as to whether he is alleging any cognizable claim for which he may be entitled to relief under section 105(c) of the Mine Act. Additionally, it noted that Mallery remains employed by El Segundo in a paid disability status and, according to El Segundo, he is eligible to return to work if he receives medical clearance from his treating physician. The Show Cause Order directed Mallery to submit a clear and concise statement of the alleged protected activity(ies) giving rise to the adverse action(s), including applicable dates, that may entitle him to relief under the Mine Act, in accordance with Commission Rule 42.

On March 11, 2024, Mallery filed a Response by letter dated March 8. Mallery Resp. I. In his Response, instead of providing a clear and concise statement, Mallery attached two previously filed documents, a Rebuttal to Peterson's Position Paper and a Statement of Relief, contending that they "clearly show protected activities, [and] the adverse actions suffered as a result." Mallery also provided explanations for untimely filing his Discrimination Complaint with MSHA and the Commission. Subsequently, on March 13, El Segundo replied, asserting that Mallery failed to provide any new information that would show good cause for his Complaint not being dismissed. El Segundo Reply I.

Recognizing that Mallery failed to provide a clear and concise statement of his cause of action, as directed by the Show Cause Order, and mindful that he is a *pro se* litigant, he was afforded a second opportunity to set forth a clear and concise statement of a cognizable claim. On March 14, 2024, I issued a Second Order to Show Cause, accepting Mallery's explanations for untimely filing his Discrimination Complaint with MSHA and the Commission and, again, directing him to show good cause why his Discrimination Complaint should not be dismissed for failure to state a claim upon which relief may be granted.

On March 22, 2024, Mallery responded to the second Show Cause Order with nearly identical wording to the narrative provided in his Discrimination Complaint, except that he added indistinct claims of a hostile work environment and assignment to undesirable tasks, and continued to maintain that his placement on short-term disability in February of 2023 constituted an adverse action. Mallery Resp. II. El Segundo filed a Reply on April 2, maintaining that Mallery has not shown any protected activity or adverse action that constitutes a cognizable discrimination claim under the Mine Act, and reiterating that Mallery's Discrimination Complaint should be dismissed. El Segundo Reply II.

II. Legal Standard

Pursuant to Commission Rule 42, a discrimination complaint "shall include a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested." 29 C.F.R. § 2700.42.

Where a discrimination complaint fails to state a claim upon which relief may be granted, the Commission looks to dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Ribble v. T&M Dev. Co.*, 22 FMSHRC 593, 594 (May 2000). Under this standard, the complainant must plead sufficient facts that, if accepted as true, allow a reasonable inference to be drawn that the respondent could be found liable for the misconduct alleged. *Ashcroft v. Iqbal*,

556 U.S. 662, 678 (2009). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant cannot prove any set of facts in support of his claim. *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1920 (Nov. 1996), citing *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). The Commission has generally viewed motions to dismiss for failure to state a claim with disfavor, and rarely grants such motions. *Ribble*, 22 FMSHRC at 594-95; *Perry*, 18 FMSHRC at 1920. Additionally, the Commission holds the pleadings of *pro se* litigants to less stringent standards. *See Perry*, 18 FMSHRC at 1920, citing *Marin v. Asarco, Inc.,* 14 FMSHRC 1269, 1273 (Aug. 1992). In such *pro se* cases, judges should ensure that they are informed of all the available facts relevant to a decision, including the complainant's version of those facts, before dismissing a case. *Id*.

A cognizable claim of discrimination under section 105(c) requires that the complainant engaged in protected activity, and that he suffered an adverse action that was, at least, partially motivated by the protected activity. *Sec'y of Labor on behalf of Smitherman, v. Warrior Met Coal Mining, LLC,* 45 FMSHRC 446, 451 (June 2023); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981). Protected activities under the Mine Act include instances in which a miner "filed or made a complaint . . . notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal . . . mine." *See* 30 U.S.C. § 815(c)(1). An adverse action is "an act of commission or omission *by the operator* subjecting the affected miner to discipline or a detriment in his employment relationship." *Pappas v. Calportland Co.*, 40 FMSHRC 664, 678 fn. 5 (May 2018) (emphasis added), citing *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.,* 6 FMSHRC 1842, 1847-48 (Aug. 1984). When the alleged discriminatory act is not a self-evident form of adverse action, like discharge or suspension, the surrounding circumstances must be carefully examined to determine the nature of the action. *Sec'y of Labor on behalf of Pendley v. Highland Mining Co.,* 34 FMSHRC 1919, 1930 (Aug. 2012). The Commission applies the test, articulated by the Supreme Court, that a discriminatory adverse action must be "materially adverse to a reasonable employee," in that "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker" from engaging in protected activity. *Pendley*, 34 FMSHRC at 1931, citing *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 57 (2006). An adverse action is not simply any employer action that a miner does not like. *Sec'y of Labor on behalf of Price & Vacha v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1533 (Aug. 1990).

III. Discussion

The issue before me is whether Mallery has stated a cognizable discrimination claim under the Mine Act, by alleging that his safety complaint(s) resulted in an employer-generated adverse action that was materially detrimental to his employment.

While Mallery has failed to provide a clear and concise statement of his cause of action, I can infer, from a thorough review of his Complaint, that there are, at least, two recent incidents of protected activity that serve as bases for his claim. Mallery alleges that, on January 5, 2023, he raised safety concerns to his supervisors about the failure of blast crews to follow standard operating procedures. Also, on January 12, he addressed the same safety concerns to mine

manager, Seth Puls, and human resources representatives, Joanna Sparks and Kischa Jackson. Therefore, without need for further inquiry into the first prong of Mallery's claim, I credit Mallery with sufficiently setting forth facts that constitute the protected activity element of a cognizable discrimination complaint.

Mallery's Complaint fails to state a cognizable claim, however, because it is not based on any employer misconduct. The gravamen of his discrimination claim is that he was placed on short-term disability for his mental health condition. By both parties' accounts, on January 12, 2023, Mallery met with mine manager Puls and human resources representatives Sparks and Jackson to discuss his concerns about safety and pay issues, during which time the conversation turned to Mallery's family situation and former military status. Mallery Resp. I, Rebut. at 9; El Segundo Reply II at 9. According to El Segundo, based on Mallery's emotionally distraught demeanor, Puls placed him on fully-paid administrative leave, pending a voluntary fit for work evaluation. El Segundo Reply II at 9. Subsequently, on February 3, a board-certified neuropsychologist assessed Mallery as not medically fit to perform his duties, and recommended that he be off work for at least three months in order to obtain treatment. Mallery Resp. I, Rebut. at 9. Mallery then voluntarily applied for short-term disability benefits pursuant to the company's disability plan, and a favorable determination was made by a third-party insurer. Under the short-term disability benefit plan, Mallery continued to receive 100% of his regular pay until April 10, when he had exhausted his leave for the year, after which he began receiving 60% of his regular pay. El Segundo Reply II at 10. Mallery also applied for an extension, and was granted long-term disability. El Segundo Ans. at 11. According to El Segundo, Mallery is eligible to return to work when he receives medical clearance from his treating physician. El Segundo Ans. at 11. While he has not suffered any break in employment, and remains in a pay status to date, Mallery has expressed that he does not desire to return to work. Mallery Resp. I, Stmt. of Relief at 1.

Being placed on short-term disability, where Mallery receives pay and benefits pursuant to the company's plan, does not constitute an employer-generated adverse action. Short-term disability is an income replacement benefit that provides a percentage of pre-disability earnings when employees are unable to work for health-related issues. El Segundo's plan is designed to compensate miners when they are unable to work for health reasons and, therefore, cannot reasonably be construed as detrimental to their terms and conditions of employment. Furthermore, Mallery voluntarily applied for the benefit and acknowledges that he has legitimate medical issues, and the determination was made by third-party medical and insurance providers. Mallery Resp. I, Rebut. at 9; El Segundo Reply II at 10-11. Short-term disability is simply not materially adverse to a reasonable employee who is temporarily unfit for duty, and the record is devoid of any indication that Mallery was coerced into applying for the contractual benefit.

Mallery's Discrimination Complaint also contains a lengthy description of workplace disputes dating back as far as 2019, some of which, in his second Response, he designated as "adverse actions." Mallery Resp. II at 1-2. Among these disputes, ranging from October 2019 to January 2023, are contentions respecting work hours and pay, not being sent to blast school, transfer to a less desirable position, not receiving the employee handbook, and a hostile work environment. These allegations far exceed the time limit applicable to initiating a complaint with MSHA, and are too remote for consideration as bases for his Discrimination Complaint of May 2023. Moreover, without more, some of these allegations appear to be employment disputes that

do not fall within the purview of the Mine Act. As the Commission has noted, it is not a "super grievance board to judge
. . . an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." *Delesio v. Mathies Moal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990).

Mindful that Mallery is *pro se*, he has been afforded two opportunities after filing his Complaint to state a claim upon which relief may be granted, by setting forth a cognizable adverse action and the protected activity that motivated it. Instead, Mallery reiterated the statements that he had previously made in his Discrimination Complaint, which are the very statements that require clarity and, as constituted, do not construct a cognizable claim.

WHEREFORE, for failure to state a claim upon which relief may be granted under section 105(c) of the Mine Act, it is **ORDERED** that Wesley Mallery's Discrimination Complaint is, hereby, **DISMISSED**, **WITH PREJUDICE.**

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

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