

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. YORK 2023-0115
	:	A.C. No. 30-03434-578738
R.J. VALENTE GRAVEL, INC.	:	

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).

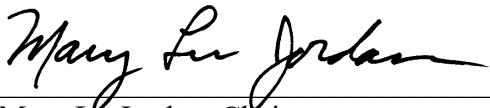
The Department of Labor's Mine Safety and Health Administration ("MSHA") indicates that delivery of the proposed assessment was attempted on June 14, 2023. The assessment became a final order of the Commission on July 14, 2023.

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.

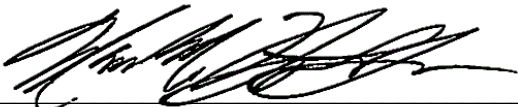
Finally, Valente filed a motion to strike the Secretary's opposition of its motion to reopen arguing that the Secretary initially did not oppose the motion but filed an untimely opposition with no warning to the operator. R.J. Valente Mot. to Strike at 1-2. The Secretary responds that her review of the 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.



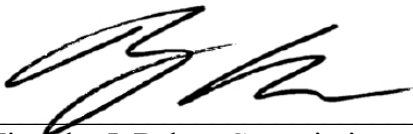
Mary Lu Jordan, Chair



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner



Timothy J. Baker, Commissioner



Moshe Z. Marvit, Commissioner

Distribution:

Michael T. Cimino, Esq.
Benjamin J. Wilson, Esq.
JACKSON KELLY PLLC
P.O. Box 553
Charleston, WV 25130
mcimino@jacksonkelly.com
Benjamin.wilson@jacksonkelly.com

Karen L. Johnston, Esq.
JACKSON KELLY PLLC
1099 18th Street, Suite 2150
Denver, CO 80202
kjohnston@jacksonkelly.com

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov