

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

October 3, 2023

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2023-0173
v.	:	A.C. No. 39-00022-571991
	:	
GCC DACOTAH, INC.	:	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, 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 May 2, 2023, the Commission received from GCC Dacotah, Inc. (“GCC Dacotah”) 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) 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).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on March 6, 2023, and became a

final order of the Commission on April 5, 2023. The Secretary of Labor does not oppose the request to reopen.

GCC Dacotah contends that it timely contested the proposed assessment on March 24, 2023, but service to the Secretary was unsuccessful due to a typo in MSHA's email address. Payment for the uncontested citations was timely received on April 5, 2023. GCC Dacotah claims that its email system did not provide an error notification that the email containing the contest had not been delivered. On April 24, a few weeks after the penalties became a final order, GCC Dacotah contacted MSHA and learned that its contest had been sent to an incorrect email address. To prevent the error from recurring, GCC Dacotah circulated a memorandum identifying the error to its safety personnel.

We note that the motion to reopen was timely filed. The Commission has previously held that “[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.” *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009). Here, the motion to reopen was filed on May 2, 2023, within 30 days of the operator learning that it had sent its contest to an incorrect address. Therefore, the motion to reopen was filed within a reasonable amount of time.

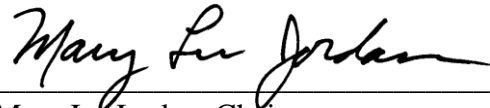
We recognize that the operator previously filed motions to reopen in May 2020. However, in those instances, the operator’s failure to timely contest the assessments resulted from incorrect assumptions regarding who bore responsibility for mailing the contest forms to MSHA. In our prior Commission order disposing of these requests to reopen, we noted briefly that the operator claimed that two assessments had not been timely contested because of “an improper understanding and implementation of an internal procedure” regarding which employee bore responsibility for contesting assessments. *GCC Dacotah, Inc.*, 43 FMSHRC 61 (Jan. 2021).<sup>1</sup> In contrast, in this matter, the operator’s failure to timely contest the assessment resulted from an error in entering an email address.

While multiple repeated processing errors of the same nature can reflect an inadequate internal processing system, *Lone Mountain*, 35 FMSHRC 3342 (Nov. 2013) (emphasizing the repeated misplacement of paperwork by the operator), a unique occurrence that results in an operator’s failure to timely contest an assessment does not necessarily reflect that the internal processing system was ineffective. *Noranda*, 39 FMSHRC 441 (Mar. 2017). There is no evidence in the record of prior instances of GCC Dacotah failing to timely contest an assessment as a result of incorrectly entering MSHA’s email address. Therefore, we find such an error to be a unique occurrence, rather than the result of an inadequate processing system. In addition, we note that the Secretary has not alleged that GCC Dacotah acted in bad faith. Furthermore, GCC Dacotah demonstrated its good faith by promptly filing the motion to reopen, and by taking precautions to prevent a recurrence of this error.

---

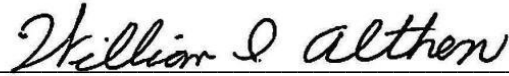
<sup>1</sup> We decided to grant these requests to reopen. *Id.*

Having reviewed GCC Dacotah's request and the Secretary's response, we find that GCC Dacotah demonstrated good cause for its failure to timely respond, and acted in good faith. 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.



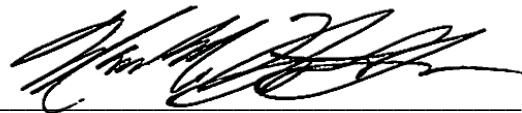
---

Mary Lu Jordan, Chair



---

William I. Althen, Commissioner



---

Marco M. Rajkovich, Jr., Commissioner

**Commissioner Baker, dissenting:**

I would find that GCC Dacotah failed to establish good cause to reopen in this case.

A party seeking the reopening of an assessment bears the burden of establishing that the default was the result of more than mere carelessness. *Noranda Alumina, LLC*, 39 FMSHRC 441, 443 (Mar. 2017). The Commission has consistently 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 an assessment. *See Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008); *Moose Lake Aggregates*, 34 FMSHRC 1 (Jan. 2012); *Kuhlman Constr.*, 34 FMSHRC 2894 (Nov. 2012); *Enviro Care, Inc.*, 39 FMSHRC 819 (Apr. 2017). When deciding whether an operator has made a showing of good cause to reopen, the Commission considers, “procedures to prevent, identify and correct such mistakes have been adopted or changed, as appropriate.” *Noranda Alumina*, 39 FMSHRC at 443. In short, an operator can demonstrate that it is not careless by setting forth in its motion to reopen new or improved procedures that it will implement to ensure that its internal processing system is adequate and reliable in the future.

In May 2020, GCC Dacotah filed a motion to reopen after it had failed to timely contest a penalty. *GCC Dacotah, Inc.*, 43 FMSHRC 61 (Jan. 2021). According to the Commission at that time, “GCC Dacotah’s motion says that the proposed assessments in these matters were not timely contested due to an *improper understanding and implementation of an internal procedure.*” *Id.* at 62 (emphasis added).

In its motion to reopen in that case, GCC Dacotah asserted that it had made changes to its internal processing system to ensure that it did not miss deadlines in the future. Specifically, GCC Dacotah’s motion included a declaration signed by its Corporate Safety Director setting forth changes the company made to ensure that assessments were properly processed. Paragraph 18 of that declaration, in relevant part, states:

In response to its fact-finding investigation, GCC has taken steps to prevent a reoccurrence. Specifically, GCC is designating the plant safety manager as the company official responsible for executing and filing the contest form in a timely manner. On May 27, 2020, I sent out an email to all of the safety managers at GCC’s MSHA-regulated facilities . . . providing instructions on contest procedures.

Based on this representation, the Commission granted the Motion to Reopen.

In its current motion, GCC Dacotah asserts that an administrative error prevented it from timely filing a contest to the assessment. However, this motion states that the mistake occurred when an employee—a “safety technician” rather than the Plant Manager—entered an incorrect email address for MSHA when sending in GCC Dacotah’s contest. Once again, GCC Dacotah has made representations that it will take actions to prevent this administrative error from recurring. Specifically, GCC Dacotah states it forwarded a memo to safety personnel regarding the error.

The circumstances set forth in GCC Dacotah’s filings demonstrate a lack of good cause to reopen. In 2020, GCC Dacotah was on notice that its processing system was not reliable and could result in mistakes. It promised to correct its processing system by ensuring that a plant safety manager would execute and file future contest forms in a timely manner. The Commission accepted that with the promised improvements, GCC Dacotah’s internal processing system would be reliable and, therefore, found good cause to reopen.

However, GCC Dacotah’s current motion to reopen shows that it failed to live up to its promise. A safety technician, rather than the Plant Manager, processed the company’s contest documents.<sup>2</sup> As a result of GCC Dacotah’s failure to follow the improvements outlined in its 2020 Motion to Reopen, its processing system remains evidently unreliable.<sup>3</sup> The fact that the mistake alleged here is slightly different than previous mistakes is irrelevant: GCC Dacotah was on notice that it needed to ensure that its processing system was reliable, not that it needed to correct a single, discrete issue. Further, I do not believe their promises to correct the problem in the future to be persuasive, as they have already made similar promises and failed to keep them in the past. Therefore, I would find that GCC Dacotah has failed to establish that it is entitled to the “extraordinary” relief of reopening. *See Lone Mountain Processing, Inc.*, 35 FMSHRC 3342 (Nov. 2013) (characterizing reopening as extraordinary relief).

In light of these circumstances I, respectfully, dissent.



---

Timothy J. Baker, Commissioner

---

<sup>2</sup> As the party seeking reopening and bearing the burden of demonstrating good cause, GCC Dacotah also bears of the burden of showing that it followed, or attempted to follow, the processing procedures it put in place. It has not done so here.

<sup>3</sup> I would find that GCC Dacotah’s failure to timely file a contest in this instance clearly demonstrates an inadequate or unreliable processing system. This is true especially in light of the representations made in the company’s May 2020 motion to reopen. However, I would also take judicial notice of two subsequent Motions to Reopen from GCC Dacotah (CENT 2023-0229 and CENT 2023-0230) which assert that the company committed the same mistake—an incorrect email address used on the contest form—and is entitled to reopening. These motions are still pending before the Commission. These motions provide additional support for the position that the mistake in this case was not isolated, but instead part of an unreliable system that did not ensure that contests were properly forwarded to MSHA. Repeated instances of the same clerical error do not warrant relief. *See Marfork Coal Co., LLC*, 2023 WL 4052208, at\*2 (FMSHRC June 7, 2023).

Distribution:

Donald Mousel  
Safety Technician  
GCC Dacotah, Inc.  
501 N. St. Onge  
Rapid City, SD 57702  
[dmousel@gcc.com](mailto:dmousel@gcc.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](mailto: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](mailto:scott.emily.t@dol.gov)

Melanie Garris  
USDOL/MSHA, OAASEI/CPCO  
201 12th Street South, Suite 401  
Arlington, VA 22202  
[Garris.Melanie@DOL.GOV](mailto:Garris.Melanie@DOL.GOV)

Chief Administrative Law Judge Glynn F. Voisin  
Federal Mine Safety Health Review Commission  
1331 Pennsylvania Avenue, NW Suite 520N  
Washington, DC 20004-1710  
[GVoisin@fmshr.gov](mailto:GVoisin@fmshr.gov)