

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 21, 2024

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2024-0147
v.	:	A.C. No. 46-08659-590373
	:	
LO DOWN ENERGY, INC.	:	

BEFORE: Jordan, Chair; 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 January 16, 2024, the Commission received from Lo Down Energy, Inc., 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 December 11, 2023, and became a final order of the Commission on January 10, 2024.

Lo Down Energy asserts the assessment was not timely contested due to mail delivery issues. Specifically, the operator informed its representative on December 18, 2023, that it would provide a copy of the assessment so it could be contested. Lo Down Energy does not have the technology to scan and email documents, so the assessment was sent by mail. The representative had not received the assessment by December 29, so he attempted to contact the operator by phone and email. He received no response until January 6, 2024, when the operator informed him the assessment had been mailed. Neither the operator nor its representative were able to locate the original mailed assessment. By the time the operator was able to provide its representative with a partial photographed copy of the assessment, the period for timely contest had expired. Lo Down Energy proposes that the holiday season may have interfered with mail delivery, and states that it will make arrangements for future assessments to be scanned and sent in a timely manner.

The Secretary opposes reopening the assessment. The Secretary suggests that Lo Down Energy has an inadequate or unreliable process for contesting assessments. She notes the operator's recent history of delinquent penalties and untimely contests arising from internal error, and states that past leniency does not give an operator license for further noncompliance. Finally, the Secretary alleges that the operator has failed to provide sufficient explanation for its failure to timely contest, for example, offering no explanation for its failure to timely respond to its representative's communications.

The Commission has long 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. *E.g.*, *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008). Here, the operator made no effort to confirm that its representative had received the assessment contest paperwork, and then failed to respond to its representative for a week once the delivery issue was discovered. Moreover, this motion represents the sixth time in an approximately three year period where the operator was unable to timely file a contest of a proposed penalty, five of which involve mail-handling procedures.¹ Lo Down Energy's internal processing system is not adequate or reliable. *See Rockwell Mining, LLC*, 49 FMSHRC 491, 493 (June 2023) (five motions to reopen in five years may cumulatively indicate an inadequate processing system); *Bresee Trucking Co.*, 34 FMSHRC 6, 8 (Jan. 2011) (previous similar motions to reopen indicated a "pattern" of failures).

Furthermore, it is well recognized in federal jurisprudence that the issue of whether the movant acted in good faith is an important factor in determining the existence of excusable neglect. *Pioneer Inv. Servs. Co. v. Brunswick Assocs., Ltd. P'ship*, 507 U.S. 380, 395 (1993); *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006). The Commission has likewise recognized that a movant's good faith, or lack thereof, is relevant to a determination of whether the movant has demonstrated mistake, inadvertence, surprise or excusable neglect within the meaning of Rule 60(b)(1) of the Federal Rules of Civil

¹ *See Lo Down Energy, Inc.*, 44 FMSHRC 252 (Apr. 2022) (reopening where contest process was disrupted by employee's illness); *Lo Down Energy, Inc.*, 43 FMSHRC 519 (Dec. 2021) (reopening four dockets where assessments were misplaced due to new mail-handling procedure).

Procedure. *Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3346 (Nov. 2013); *M.M. Sundt Constr. Co.*, 8 FMSHRC 1269, 1271 (Sept. 1986); *Easton Constr. Co.*, 3 FMSHRC 314, 315 (Feb. 1981). Some of the factors relevant to the good faith analysis are the number of delinquent penalties outstanding, the period of time the delinquent penalties accrued, and the seriousness of the citations underlying the aforementioned penalties. *Kentucky Fuel Corp.*, 38 FMSHRC 632, 633 (Apr. 2016); also *Oak Grove Res. LLC*, 33 FMSHRC 1130, 1132 (June 2011).

Here, the Secretary represents that Low Down Energy was notified in January of 2023 of more than \$14,500 in unpaid delinquent penalties for almost 60 violations issued between 2019 and 2022. While Low Down Energy entered into a payment plan with MSHA on these older penalties, it has already accrued an additional \$45,000 in additional delinquent penalties in the time since. The operator's multiple, prolonged failures to timely pay penalties frustrates the deterrent purposes of the Act and demonstrates that the operator is not acting in good faith. Compare *Kentucky Fuel*, 38 FMSHRC at 633 (finding that an operator with total outstanding penalties of over \$350,000 spanning 140 cases over a four year period had shown a disregard of final penalty assessments and was not entitled to extraordinary relief).

Lo Down Energy asserts that it will take steps to ensure future assessments are timely contested. However, given its recent history, the operator should already have been on notice that additional care was required, and should already have taken steps to improve its processing system. We acknowledge that postal service delivery issues may have contributed to the initial delay in contesting the assessment, and note that the operator acted promptly in filings its motion to reopen. However, these are insufficient to justify relief in view of the operator's systemic issues.

Having reviewed Lo Down Energy's request and the Secretary's response, we find that the operator has not justified reopening the captioned proceeding. Accordingly, we deny Lo Down Energy's motion.


Mary Lu Jordan, Chair


Timothy J. Baker, Commissioner


Moshe Z. Marvit, Commissioner

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