

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**October 23, 2024**

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2024-0067
v.	:	A.C. No. 42-00147-584365
	:	
TINTIC CONSOLIDATED METALS,	:	
LLC	:	

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

**ORDER**

BY: Jordan, Chair, and Marvit, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On December 1, 2023, the Commission received from Tintic Consolidated Metals, LLC (“Tintic”) 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 Tintic was issued citations between July 11, 2023, and July 19, 2023. MSHA proposed penalty assessments in the amount of \$67,007, on September 5, 2023. The Secretary states in part that the proposed assessment was delivered to Tintic on September 14, 2023, and became the final order of the Commission on October 14, 2023. S. Opp’n at 4.

On October 5, 2023, the operator, acting pro se, filed a document with the Commission. T. Reply at 2.<sup>1</sup> The document explained that Tintic was contesting citations “from the Proposed Assessment and Statement of Account dated 09/05/2023 and received 09/11/2023.” *See* Doc. dated 10-5-23, at 1 (Docket No. WEST 2024-0009). Although the document was filed with the Commission, it was addressed to “US-DOL-MSHA, Civil Penalty Compliance Office, 201 12th Street South, Suite 401, Arlington, VA 22202-5452.” *Id.*

On November 6, 2023, MSHA sent Tintic a demand letter for unpaid penalties listed on the proposed assessment. S. Opp’n at 2. Two days later, on November 8, Tintic contacted MSHA about the status of its contest. T. Reply at 2. MSHA informed Tintic that the contest had not been received and directed Tintic to MSHA’s Civil Penalty Compliance Office. *Id.* On November 17, 2023, Tintic contacted the Compliance Office, which confirmed that the penalty contest had not been received. *Id.* at 3. Tintic filed the penalty contest with MSHA on November 20, 2023. *Id.* Two days later, MSHA rejected the penalty contest as untimely. *Id.* On November 30, the operator filed its motion to reopen, and the Commission docketed the motion on December 1.

Tintic explains that it intended to contest the proposed penalties with its October 5 filing, but that it mistakenly filed its contest with the Commission rather than with MSHA’s Civil Penalty Compliance Office. T. Reply at 2-3; T. Reply to S. Leave to File Surreply at 3-4. The Secretary opposes Tintic’s motion to reopen.

Under the Commission’s Procedural Rules, an operator may contest proposed penalties by notifying the Secretary of its contest within 30 days after receipt of the proposed penalty assessment. 29 C.F.R. § 2700.26. However, if a party wishes to contest a citation, the party must notify both the Commission and the Secretary. *See* 29 C.F.R. § 2700.20. In circumstances in which an operator contests a citation (section 2700.20), but fails to file a contest of the penalty (section 2700.26), the proposed penalty becomes a final order of the Commission. 29 C.F.R. §§ 2700.27. 2700.21(a). Here the Commission treated Tintic’s October 5 filing as a contest of citations, and the proposed penalties became final orders.

Having considered the filings provided by the parties, we construe Tintic’s October 5 filing as an attempt to contest the proposed penalties. The contest was filed within 30 days of Tintic’s receipt of the proposed penalty assessment. The operator’s timely but misdirected filing with the Commission was a good faith, albeit mistaken, attempt to comply with the requirements

---

<sup>1</sup> Tintic filed a reply to the Secretary’s opposition to its motion to reopen. The Secretary subsequently filed a motion for leave to file a surreply, and Tintic filed a response to that request. The Secretary later filed her surreply. We hereby grant the parties leave to file these submissions and hereby accept these filings as part of the record.

of the Mine Act and the Commission's procedural rules. We conclude that the proposed penalty assessment was not timely contested due to a mistake or excusable neglect and that the operator established good cause to reopen the final order. *See Mulberry Limestone Quarry Co.*, 45 FMSHRC 814 (Sept. 2023) (concluding that operator's timely but misdirected filing constituted good cause for failure to timely contest penalty assessment).

Accordingly, 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

  
\_\_\_\_\_  
Moshe Z. Marvit, Commissioner

Commissioner Baker, dissenting:

I would find that that Tintic Consolidated Metals, LLC (“Tintic”) failed to establish good cause to reopen in this case.

A party seeking the reopening of an assessment bears the burden of establishing that 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, 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).

Where a defaulting party was aware of or should have been aware of its responsibilities to the opposing party and to the court and has failed to live up to those responsibilities through unexcused carelessness or negligence, relief from default should not be granted. *C.K.S. Eng’rs, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1206 (7th Cir. 1984); *see also Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990) (stating carelessness or negligence is not sufficient to warrant relief under Rule 60(b)(1)). Although a default judgment is a harsh sanction and the law favors trials on the merits, these considerations must be balanced against the need to promote efficient litigation and to protect the interests of all litigants. *C.K.S. Eng’rs, Inc.*, 726 F.2d at 1206. Default judgment is only an effective deterrent against irresponsible conduct in litigation if relief from a default judgment under Rule 60(b) is perceived as an exceptional remedy. *Id.*

As the majority recognizes, Tintic failed to timely file a contest to the proposed penalties in accordance with the relevant regulations. The operator attempts to excuse this failure by arguing that its Safety Coordinator filed a “pre[-]penalty contest of the citations.” MTR at 1. Tintic submits that its Safety Coordinator exchanged emails with FMSHRC staff and believed that she filed “a penalty assessment contest” correctly. *Id.* When the Safety Coordinator left the company in early October, the operator believed that the “documentation” had been done correctly. *Id.* When “no response was received,” the operator’s management reviewed what had been filed and reached out “to rectify the situation.” *Id.* Tintic states that its former Safety Superintendent has assumed responsibility for the safety department following its Safety Coordinator’s departure, and he has correctly contested several assessments in the past. *Id.*

Tintic’s counsel, who was retained following the filing of the motion to reopen, states that the pre-penalty contest filed by the operator was actually a contest of the proposed penalty assessment that had been erroneously filed with the Commission rather than submitted to MSHA. Counsel additionally specifies that on November 8, 2023, Tintic contacted MSHA about the status of its contest, was informed that the contest had not been received, and was directed to MSHA’s Civil Penalty Compliance Office. T. Reply at 2.

On November 17, 2023, Tintic contacted the Compliance Office, which confirmed that the penalty contest had not been received. Tintic filed the penalty contest with MSHA on

November 20, 2023. *Id.* at 3. MSHA rejected the penalty contest as untimely, and the operator filed its motion to reopen. *Id.*

The Secretary opposes the motion to reopen. The Secretary argues that the operator is not entitled to relief because it has inadequate or unreliable internal procedures as evident by the staffing changes justification for the late-filing alleged in the subject proceeding and in a separate proceeding, Docket No. WEST 2023-0406. The Secretary also argues that Tintic waited to file its motion to reopen until after it received the demand letter, made no mention of the demand letter, and such actions suggest that the operator is not acting in good faith. S. Opp'n at 8-9. The Secretary maintains that Tintic has provided no explanation for why it failed to timely contest the assessment, or what steps it took to ensure that it timely contested penalties after filing its other motion to reopen. S. Surreply at 6.

It appears that the operator has confused the process for contesting citations before a penalty is proposed with the process for contesting proposed penalties. *See* 29 C.F.R. Part 2700 subparts B and C. In its motion to reopen, the operator states that it filed “*pre[-]penalty* contest[s] of the citations.” MTR at 1 (emphasis added). The Commission’s Docket Office received the contests on October 5, 2023, treated the submissions as timely contests of citations, and the Secretary filed answers to those contests.<sup>2</sup> Tintic’s counsel, however, submits that the contests of the citations were actually timely contests of the proposed penalties under 29 C.F.R. § 2700.25 that were mistakenly filed with the Commission, rather than with MSHA. Such confusion shows an inadequate or unreliable processing system.

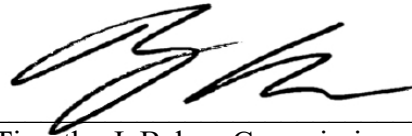
In addition, Tintic filed a motion to reopen in a separate proceeding, Docket No. WEST 2023-0406, asserting that it was unable to timely file its penalty contest due to a staffing change. The Commission denied Tintic’s motion, concluding that Tintic’s explanation was inadequate because it did not provide sufficient detail regarding how personnel changes caused the untimeliness and which actions the operator would take to ensure timely filing in the future. 46 FMSHRC \_\_\_, No. WEST 2023-0406 (Aug. 28, 2024). The Commission has recognized that repeated motions to reopen may indicate an inadequate or unreliable internal processing system. *Rockwell Mining, LLC*, 45 FMSHRC 491, 493 (June 2023). Here it appears that any actions taken by Tintic to ensure timeliness were ineffective, and that the repeated motions show an inadequate or unreliable processing system.

---

<sup>2</sup> Contests were filed with respect to Citation Nos. 9901903 (WEST 2024-0009), 9901905 (WEST 2024-0010), 9901908 (WEST 2024-0011), 9901909 (WEST 2024-0012), 9901910 (WEST 2024-0013), 9901912 (WEST 2024-0014), and 9901914 (WEST 2024-0015). Tintic did not file a contest of Citation No. 9091915, although it indicated on its proposed assessment form that it intended to contest the penalty associated with that citation.

Based on the operators shifting rationales for re-opening and evident lack of a reliable contesting process, I would find that it 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

Distribution:

Robert D. Ayers  
Erik J. Adams  
Holland & Hart LLP  
P.O. Box 68  
Jackson, WY 83001  
rdayers@hollandhart.com  
ejadams@hollandhart.com

Kim Spear, Mine/Safety Superintendent  
M. Marnie Taylor, Safety Coordinator  
Zachary Wallace, Alt. Mine/Safety  
Superintendent  
P.O. Box 195  
Eureka, UT 84628  
Kspear@tinticmetals.com  
mtaylor@tinticmetals.com  
Zwallace@tinticmetals.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  
Office of the Chief Administrative Law Judge  
Federal Mine Safety Health Review Commission  
1331 Pennsylvania Avenue, NW Suite 520N  
Washington, DC 20004-1710  
GVoisin@fmshrc.gov