FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

January 4, 2024

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2023-0297
ADMINISTRATION (MSHA)	:	A.C. No. 46-05437-569447
	:	
v.	:	
	:	
PANTHER CREEK MINING, LLC	:	

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

ORDER

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

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On April 25, 2023, the Commission received from Panther Creek Mining, LLC ("Panther Creek") a motion to reopen a final order of the Commission pursuant to section 105(a) of the 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 to the operator on January 17,

2023, and became a final order of the Commission on February 16, 2023, after Panther Creek did not contest the penalties. In the assessment, MSHA had proposed a total civil penalty of $75,601 for the 49 citations at issue.

On April 3, 2023, after failing to receive payment, the Secretary sent the operator a delinquency notice. On approximately April 17, 2023, MSHA delivered a scofflaw letter to the mine, which stated that if the operator did not pay the delinquent penalties within 30 days MSHA may take further action. The operator filed the subject motion to reopen on April 25, 2023. On May 17, 2023, MSHA issued a citation to Panther Creek alleging a failure to pay.

In the subject motion to reopen, Panther Creek maintains, without further explanation, that an internal "administrative error" delayed routing of the assessment to its Corporate Safety Director and thus its ability to timely file. The Secretary opposes reopening. She asserts that the operator has failed to establish that its failure to timely file was the result of an atypical mistake and not the result of an inadequate processing system. Furthermore, the operator has failed to establish that it has been acting in good faith.

When filing a motion to reopen before the Commission the operator bears the burden of showing exceptional circumstances. *Lone Mountain Processing, Inc*., 35 FMSHRC 3342, 3345 (Nov. 2013). Relief under Rule 60(b) requires more than "general assertions or conclusory statements as to why an operator failed to timely contest." *Sw. Rock Prods.*, 45 FMSHRC __ (August 30, 2023) (*citing Atlanta Sand & Supply Co*., 30 FMSHRC 605, 608 (July 2008).

Although the Commission may consider motions to reopen filed within 30 days of the operator's receipt of its first notice of delinquency to be filed within a reasonable amount of time; the motion must also "set forth an adequate explanation for its reasons for its delinquency." *See Highland Mining Company*, 31 FMSHRC 1313, 1316-17 (Nov. 2009). "At a minimum, the applicant for such relief 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 and for any delays in seeking relief once the operator became aware of the delinquency or failure. . . ." *Lone Mountain,* 35 FMSHRC at 3345 (*citing Higgins Stone Co*., 32 FMSHRC 33, 34 (Jan. 2010)).

Panther Creek's motion lacks these required details. Its motion does not include relevant dates or a description of the processing error.[1] Accordingly, it has failed to demonstrate that its "administrative error" was excusable and not the foreseeable result of its own unreliable internal processing system. It is well established that an inadequate or unreliable internal processing system does not constitute inadvertence, mistake or excusable neglect so as to justify the reopening of an assessment which has become final under section 105(c) of the Mine Act.

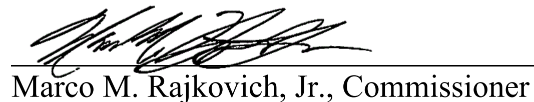
[1] *Cf. Heidelberg Materials, US Cement, LLC*, 45 FMSHRC ___ (Dec. 6, 2023) (finding that the operator established that its failure to timely file to contest three citations was the result of a good cause). In *Heidelberg Materials*, the operator's motion described the error with particularity, *i.e*., an employee neglected to transmit a single page of the contest form when timely filing to contest penalties listed on the proposed assessment.

Pinnacle Mining Co., 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co*., 31 FMSHRC 1313, 1315 (Nov. 2009): *Double Bonus Coal Co*., 32 FMSHRC 1155, 1156 (Sept. 2010); *Elk Run Coal Co*., 32 FMSHRC 1587, 1588 (Dec. 2010).[2]

Furthermore, Panther Creek has not demonstrated good faith efforts to comply with the Commission's filing deadlines. The operator received 49 citations over 18 days and thus should have been aware that it would be receiving a sizable proposed penalty assessment. Nevertheless, it does not cite to any efforts it took to either contest or reopen the penalties until after it received both a delinquency letter and a scofflaw letter. It is well recognized that a movant's good faith or lack thereof is an important factor in determining whether good cause exists to reopen a final order. *See, e.g., Stone Zone*, 41 FMSHRC 272, 274 (June 2019) (citations omitted).

For these reasons, Panther Creek's motion is DENIED with prejudice.[3]

Mary Lu Jordan, Chair



Marco M. Rajkovich, Jr., Commissioner

Timothy J. Baker, Commissioner

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[2] This is not the first instance where Panther Creek sought reopening of a final order of the Commission after an alleged error prevented timely filing of the contest form. *See Panther Creek Mining, LLC*, 40 FMSHRC 1158 (Aug. 2018) (reopening a final order after the assessment was not timely contested because the assessment was "mishandled" at the mine). Notably, the operator thereafter changed its address of record from a P.O. Box to the corporate office in an attempt to prevent further mishandlings of penalty assessments. *Id*. at 1159. Clearly, the operator's efforts were ineffective.

[3] In its reply to the Secretary's response, the operator contends that the Secretary failed to demonstrate prejudice or that the default was warranted. However, we have long held that it is the operator, not the Secretary, who has the burden of showing that it is entitled to such extraordinary relief. *See, e.g., Noranda Alumina*, 39 FMSHRC 441, 443 (Mar. 2017).

Commissioner Althen dissenting,

I respectfully dissent.

The pleadings demonstrate that MSHA provided a notice of a delinquency to Panther Creek through a letter mailed on April 3, 2023. In turn, Panther Creek filed its motion to reopen on April 25, 2023—a short period after receiving the notice from MSHA.

Binding Commission precedent holds, "Motions 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). Indeed, the Commission reaffirmed, or at least restated, this principle a few days ago. *Heidelberg Materials, US Cement, LLC*, 45 FMSHRC ___ (Dec. 6, 2023).

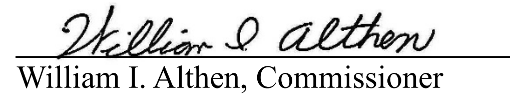
Because Panther Creek's motion fits within this timeline, the majority cannot find unreasonableness in the delay in filing. Ignoring the reasonableness of the operator's timing of its motion, the majority complains that the employee's affidavit swearing to an administrative error was insufficient to warrant reopening or even an opportunity for further explanation.

Panther Creek's contest system failed in this instance, but there is no evidence of a systematic failure. Instead, Panther Creek described a straightforward and simple system for contesting penalties. According to Panther Creek's affidavit, the system involves an administrative employee scanning proposed assessments when they are received and then directing them to the corporate safety director. The corporate safety director then reviews the citations and files timely notices on those Panther Creek wishes to contest. This appears to be a sensible two-step and an ordinarily reliable system for dealing with citations. If every singular failure to file on a timely basis is taken as a *per se* demonstration of an unreliable processing system, operators may look forward to few, if any, approvals of reopening.

The occurrence of a mistake is self-evident. The administrative staff tasked with scanning and forwarding the proposed assessment failed to follow normal procedure in this instance. Panther Creek filed a proper affidavit attesting to the error. Nonetheless, the majority forecloses a contest of more than $75,000 in assessed penalties because they find Panther Creek did not explain adequately the exact minutiae that lead to the administrative error. The Commission has not required a detailed explanation of an "administrative error" to reopen a case. *U.S. Silver – Idaho, Inc.*, 33 FMSHRC 1044, 1045 (May 2011).

Having avowed they recognize that default is a harsh remedy, the majority should have granted the motion or, minimally, should have provided Panther Creek an opportunity to provide any desired information. Such inquiries have been made in the past and are consistent with recognition of harsh result rather than the back of the hand rejection in this case. *See, e.g., Callender Constr. Co*., 44 FMSHRC 536 (Aug. 3, 2022), *Lafarge Aggregates Southeast, Inc.,* 31

FMSHRC 555 (May 2009) (granting the motion to reopen after the Commission initially denied without prejudice to allow the operator to refile and explain the "administrative error").



William I. Althen, Commissioner

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