

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 8, 2024

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2023-0218
v.	:	A.C. No. 16-00970-574494
	:	
MORTON SALT, INC.	:	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, 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 June 23, 2023,¹ the Commission received from Morton Salt, Inc. (“Morton”), 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).

¹ On July 19, 2023, Morton filed an Amended Motion to Reopen correcting a referenced citation number from 9673919 to 9674919.

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on April 11, 2023. On May 11, 2023, MSHA received partial payment in the amount of \$3,030.00 for 12 of the 16 citations listed on the proposed assessment. On May 17, 2023, the assessment became a final order of the Commission with respect to the penalties of the remaining four citations. On July 3, 2023, MSHA sent the operator a delinquency notice.

Morton states that on April 26, 2023, it checked the boxes on the proposed assessment to indicate that it was contesting Citation Nos. 9676699, 9674919, 9674924, and 9674925. The operator maintains that it had also sent a conference request on March 3, 2023, for Citation Nos. 9674924 and 9674925 but received no response. Morton submits that although its EHS Manager timely completed the contest form, he inadvertently failed to mail or email the form. It contends that it will make the required change to its process to be sure that this error does not occur again. The operator requests that the Commission reopen the penalty assessment to permit Morton to contest the four citations.

The Secretary opposes the operator’s motion to reopen. The Secretary argues that Morton has failed to timely contest proposed assessments in the past, and that the repeated failures indicate that the operator has an unreliable system for processing assessments. The Secretary further disputes that MSHA failed to respond to its conference request. She also notes that the operator has reason to pay particular attention to its citations and penalties because the operator’s mine has been notified that it has a pattern of violations and two of the citations (Nos. 9674924 and 9674925) were designated as significant and substantial in nature.²

Consistent with the Secretary’s submission, the Commission has previously reopened penalty assessments issued to Morton that became final due to the operator’s inadvertence or mistake in processing its proposed assessments. *Morton Salt, Inc.*, 44 FMSHRC 533 (Aug. 2022); *Morton Salt, Inc.*, 45 FMSHRC ___, No. CENT 2022-0237 (May 16, 2023). The Commission has recognized that repeated motions to reopen may indicate an inadequate or unreliable internal processing system. *Rockwell Mining, LLC*, 45 FMSHRC ___, Nos. WEVA 2022-0467, et al. (June 29, 2023). Although Morton has stated that it will take action to prevent such a reoccurrence in the future, it has not identified the steps it will take.

In addition, it appears that MSHA responded to the operator’s request for a conference and provided information about contest procedures. An attachment to the Secretary’s opposition reveals that on April 18, 2023, the operator sent MSHA an email acknowledging that it had received the proposed assessment on April 11, 2023, that it had 30 days to contest the citations on the assessment, and that the operator had requested a conference on Citation No. 9674919 on

² Section 104(e)(1) of the Mine Act provides that if an operator has a pattern of violations of mandatory health or safety standards which are of such nature as could significantly and substantially contribute to the cause and effect of health or safety hazards, it shall be given written notice that such a pattern exists. If, within 90 days following issuance of the POV notice, an inspector cites the operator for a significant and substantial violation, then MSHA may issue a withdrawal order under section 104(e) of the Act. 30 U.S.C. § 814(e)(1).

March 8, 2023, and on Citation Nos. 9674924, and 9674925 on March 16. MSHA responded by email dated April 25, 2023, that those citations had been assessed and were not eligible for a conference, and that if the operator wished to contest the citations, it would “need to select the citation on the assessment form and return the contested assessment form to the assessment office.” Attach. D.

The Commission has made it clear 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. *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); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008).

We find that Morton has not asserted good cause for its failure to timely contest the proposed penalties. *See Marfork Coal Co.*, 45 FMSHRC ___, No. WEVA 2023-0043 (June 23, 2023) (denying a motion to reopen when the operator neglected to fix problems with its internal procedures). The motion is DENIED WITH PREJUDICE.



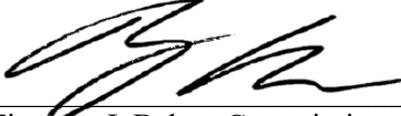
Mary L. Jordan, Chair



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner



Timothy J. Baker, Commissioner

Distribution:

Donna Vetrano Pryor, Esq.
Husch Blackwell LLP
1801 Wewatta Street, Suite 100
Denver, CO 80202
donna.pryor@huschblackwell.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