FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 9, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2023-0205
v.	:	A.C. No. 21-03404-570153
UNITED TACONITE, LLC,	:	

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

ORDER

BY: Jordan, Chair; Rajkovich and Baker, 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 June 23, 2023, the Commission received from United Taconite, LLC ("United"), 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 to the operator on January 24, 2023. On February 23, 2023, the assessment became a final order of the Commission.

United Taconite argues that staffing changes caused its failure to timely file a contest of twenty civil penalties listed on the proposed assessment. It explains that its Senior Safety Specialist, who makes the decisions about which citations and penalties to contest, was working in another department at the time of the issuance of the proposed assessment. In addition, the operator's safety manager, who managed the proposed assessment forms, was permanently transferred to another department on February 16, 2023, and a new health and safety specialist was hired on January 20, 2023. United Taconite states that when its safety manager departed on February 16, he handed mail, which included the proposed assessment, to the new safety specialist without providing any instructions. No action was taken on the proposed assessment. After the Senior Safety Specialist returned to the safety department, he received a delinquency notice and contacted outside counsel.[1] On April 24, 2023, he trained the newly hired safety specialist on procedures for handling MSHA assessments. United Taconite explains that any further delay after receiving the delinquency notice was the result of counsel's investigation, preparation of the motion to reopen, and counsel's litigation schedule. Mot. at 6.

The Secretary opposes the operator's motion to reopen. The Secretary states that on March 15, 2023, MSHA received partial payment for three citations. On April 10, 2023, MSHA sent United Taconite a delinquency notice. On May 1, 2023, MSHA received another partial payment for 9 of the 59 citations. On June 2, 2023, MSHA issued United Taconite a demand letter stating that the operator must pay a total of $70,737 within 30 days or MSHA would take additional enforcement action. On July 14, 2023, MSHA issued a citation alleging that United Taconite had violated the Mine Act through its failure to pay.

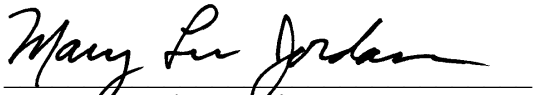
In opposing United Taconite's motion, the Secretary argues that the operator's explanation that no action had been taken on the proposed assessment because there were personnel changes and that the newly hired safety specialist did not know the payment or contest process "boils down to inadequate procedures for responding to proposed penalties." Sec'y Response at 7. The Secretary asserts that the operator should have been more careful with the filing of the contests in this case given the large penalties proposed. She submits that although the new safety specialist was later trained, it did not address the inadequate procedures in this case. The Secretary contends that United Taconite filed its motion to reopen over 2 months after MSHA sent it a delinquency letter.

[1] We note that our dissenting colleague states that when the Senior Safety Specialist received the notice of delinquency, he immediately returned the penalty assessment noting 20 citations the operator wished to contest. Slip op. at 4. Although the proposed penalty assessment form is signed and dated April 20, 2023, there are no allegations in the record that the operator returned the contest form to MSHA on or near that date. Rather, the contest form appears in the record as an attachment to the operator's June 23 motion to reopen. *See, e.g.,* Ex. C 001 (affidavit of senior safety specialist stating that once he became aware of the delinquency notice, he contacted the outside counsel's paralegal who informed him that it would be necessary to file a motion to reopen).

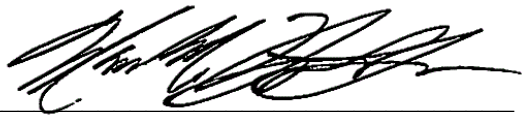
The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove 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). United Taconite did not provide the employee with training on proposed assessments, or otherwise remedy the confusion resulting from the staffing changes, for over two months. This amounts to an inadequate or unreliable internal processing system.

In addition, United Taconite failed to file the motion to reopen within a reasonable time. 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). The operator's June 23 motion to reopen was filed months after it received the April 11 delinquency letter and weeks after MSHA sent the operator a demand letter.

We find that United Taconite has not asserted good cause for its failure to timely contest the proposed penalties. *See Moose Lake Aggregates, LLC*, 34 FMSHRC 1, 2-3 (Jan. 2012) (denying a motion to reopen when the operator had deficient internal procedures and failed to file motion within a reasonable time). The motion is denied with prejudice.



Mary Lu Jordan, Chair



Marco M. Rajkovich, Jr., Commissioner

Timothy J. Baker, Commissioner

Commissioner Althen, dissenting:

I respectfully dissent.

This motion to reopen involves an attempt by United Taconite to challenge 20 citations totaling nearly $70,000 in proposed penalties.

The facts are not contested. A United Taconite Safety Specialist oversaw dealing with assessments. When he temporarily left his department in June 2022, a safety manager took over processing citations. However, that safety manager left that position virtually simultaneously with the receipt of the subject assessments. A new person replaced him but did not know the contents of the envelopes left behind.

In March, the Safety Specialist who had been on temporary reassignment returned and went over outstanding issues with the new Safety Specialist who had been unaware of the citations. At that point, the assessments were discovered.

When the Senior Safety Specialist found the notice of delinquency, he immediately returned the penalty assessment noting 20 challenged citations demonstrating its desire to contest those citations. United Taconite also responsibly turned the filing of a formal motion over to outside counsel. A paralegal for outside counsel affirmed via affidavit that United Taconite contacted her on April 21, 2023, regarding the delinquency notice that had been mailed by the Secretary on April 10, 2023. Writing with great integrity, the law firm acknowledges in the motion it filed that:

> Any further delay beyond the initial discovery of the delinquent Assessment [mid-April] upon receipt of the delinquency notice make April 3, was the result of counsel for United Taconite's investigation of this matter, preparation of the Motion to Reopen and related documents, and counsel's additional litigation schedule.

Mot. to Reopen at 6 (June 8, 2023).

United Taconite proved that it recognized its error and acted to correct it virtually immediately upon receiving first notice of delinquency. Within the last few days, the Commission reaffirmed a long-established position regarding timely recognition of an error.

> The Commission has held that quick action after recognizing an error militates in favor of reopening. "Motions to reopen received within 30 days of an operator's 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).

Heidelberg Materials, US Cement, LLC v. Sec'y, 45 FMSHRC ___ (Dec. 6, 2023).

Undoubtedly, United Taconite's immediate action upon receipt of receiving notice of the error compels a finding of good faith. If the operator had typed a note asking to reopen with the submission, it unquestionably would be presumptively considered to have filed its motion within a reasonable time. Ignoring the operator's quick action, the majority uses a technicality that United Taconite did not file a "motion" to reopen but instead, acting reasonably, turned to its outside counsel.

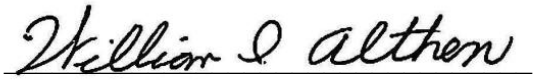
The majority finds a reason to find a default of 20 citations comprising a very large penalty amount because United Taconite turned to its attorneys and the attorneys took two months to file the formal motion. The Secretary does not assert any prejudice because of the delay in filing a formal motion challenging the citations that the operator quickly contested upon receiving a notice of delinquency. *Cf. Long Branch Energy*, 34 FMSHRC 1984, 1991 (showing leniency to the Solicitor for failing to file timely during a period of increased litigation when actual prejudice could not be shown). Under these circumstances, United Taconite provided timely notice of its desire to challenge and an explanation of reasons for its failure to file within 30 days of receipt of the citations.

Apparently recognizing that United Taconite acted with promptness to notify MSHA and the Commission of its desire to contest citations, the majority also finds that United Taconite had an unreliable internal processing system. That allegation is false.

These facts do not show an unreliable system. They show a sui generis situation in which turnover of staff simultaneously with the temporary absence of a Safety Specialist led to a brief delay in recognizing and dealing with the assessments. With the Safety Specialist's return and within 30 days of first notice, United Taconite served notice of its desire to contest the 20 citations. In short, a reliable internal system was temporarily disrupted by the simultaneous absence of the prior safety manager and the temporarily reassigned Safety Specialist.

This case does not reflect poor internal processing or lack of expedition by United Taconite. It is a singular event caused by staff turnover. Yet, the majority reviews United Taconite's quick action and finds no difficulty in refusing it the opportunity to contest penalties totaling a very high amount.

The majority's opening paragraph purports to recognize that default is a harsh remedy. Institutions are known for the actions they take not the high-sounding words they write. The majority's decision belies their words.



William I. Althen, Commissioner

Distribution:

Patrick W. Dennison, Esq.
Fisher & Phillips LLP
6 PPG Place
Suite 830
Pittsburgh, PA 15222
pdennison@fisherphillips.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