FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

January 15, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. SE 2024-0080 A.C. No. 40-03530-531187
v.	Docket No. SE 2024-0081 A.C. No. 40-03530-534568
POTTER SOUTH EAST, LLC	Docket No. SE 2024-0082 A.C. No. 40-03530-582391

BEFORE: Jordan, Chair; Baker, and Marvit, Commissioners

ORDER

BY: Jordan, Chair, and Baker, Commissioner

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act").[1] On January 23, 2024, Potter South East, LLC, ("Potter") filed a motion to reopen the three above-captioned cases which had become final orders 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] The Commission hereby consolidates these above-captioned matters pursuant to Commission Procedural Rule 12 because they are "proceedings that involve similar issues." 29 C.F.R. § 2700.12.

Potter filed a *pro se* motion to reopen the proceedings which simply states: "[t]he amount of the assessment penalty was a total surprise to us, as we have implemented procedures to prevent and correct every situation that may have resulted in a citation." Mot. at 1.

The Secretary of Labor filed a motion in opposition, arguing that Potter's motion fails to fulfill its burden to explain why it did not timely contest the penalties and to explain its delay in seeking reopening after receiving delinquency notices.[2] She further contends that Potter's repeated record of failures to timely contest penalty assessments in prior cases indicates an inadequate or unreliable internal processing system.

The Commission requires that, at a minimum, a motion to reopen "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." *Noranda Alumina, LLC,* 39 FMSHRC 441, 443 (Mar. 2017) (citing *Higgins Stone Co*., 32 FMSHRC 33, 34 (Jan. 2010).

Potter's terse motion is deficient as it neither alleges good cause for reopening under Rule 60(b) nor provides a factual accounting for Potter's failure to timely contest the penalties. *See, e.g.*, *Copenhaver Constr., Inc*., 43 FMSHRC 113 (Mar. 2021) (denying a motion as "deficient on its face" because it did not assert a reason justifying relief pursuant to Rule 60(b)).[3]

Finally, with respect to the assessments associated with Docket Nos. SE 2024-0080 and SE 2024-0081, the motion to reopen was filed more than one year after the final order was

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[2] Docket No. SE 2024-0080 concerns five citations and became a final order on April 19, 2021. On June 4, 2021, the U.S. Department of Labor, Mine Safety and Health Administration ("MSHA") sent Potter a delinquency notice for the penalties. Almost one year later, on June 1, 2022, MSHA received a partial payment from Potter which it applied to three of the citations at issue.

Docket No. SE 2024-0081 concerns four citations and became a final order on June 14, 2021. MSHA sent Potter a delinquency notice on July 30, 2021. On April 14, 2022, MSHA received partial payment in the amount of $285.65 for one citation.

Docket No. SE 2024-0082 concerns one citation and became a final order on September 18, 2023. MSHA sent Potter a delinquency notice on November 2, 2023.

[3] Furthermore, 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). 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); *see also* *Oak Grove Res. LLC*, 33 FMSHRC 1130, 1132 (June 2011). Since only December 2021, Potter has accumulated five delinquent penalty assessments that have been referred to the Department of Treasury, which involve 38 unpaid penalties totaling almost $35,000. *See* Sec'y Mot. Opp., Attachment I.

entered. Under Rule 60(c)(1) of the Federal Rules of Civil Procedure, any motion for relief from a final order pursuant to Rule 60(b) must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered. *See, e.g.*, *Carmeuse Lime & Stone*, 33 FMSHRC 1783, 1784 (Aug. 2011).

Furthermore, Potter's repeated failures to timely contest prior penalty assessments indicate an inadequate or unreliable internal processing system. Its previous reopens, docketed under SE 2022-0204, SE 2022-0205, SE 2022-0206, SE 2022-0207, and SE 2022-0208, were filed with the Commission on September 1, 2022. The Secretary responded with an opposition on September 16, 2022, and the Commission rendered a decision consolidating the dockets and denying the five motions to reopen "with prejudice" on March 22, 2023.

The Commission has recognized that repeated motions to reopen may indicate an inadequate or unreliable internal processing system. *Morton Salt, Inc.*, 46 FMSHRC 15, 17 (Jan. 2024); *see Marfork Coal Co.*, LLC, 45 FMSHRC 463, 464–65 (June 2023) (denying a motion to reopen where the operator was on notice of inadequate processes but failed to six them). Repeated failures to file timely contests are construed as inadequate or unreliable internal procedures that do not constitute an adequate excuse.

Potter's repeated failures to timely contest penalties shows that it has inadequate and unreliable procedures. The same rationale, *verbatim*, used in Potter's previous motions to reopen is being used in this motion, with only the case numbers being changed. Because Potter is filing the same reopen as it previously did on September 1, 2022, and as the Commission stated in its decision for that reopen, "Potter's terse motion is deficient as it neither alleges good cause for reopening under Rule 60(b) nor provides a factual accounting for Potter's failure to timely contest the penalties." *Potter South East, LLC*, 45 FMSHRC 152, 154 n.3 (Mar. 2023) (denying a motion to reopen), Potter's current motion to reopen reflects its inadequate or unreliable internal procedures.

For all the aforementioned reasons, Potter's motion is DENIED with prejudice.

Mary Lu Jordan, Chair

Timothy J. Baker, Commissioner

Commissioner Marvit, concurring:

I write to agree with the Majority in this case for the reasons set forth below.

In *Explosive Contractors*, 46 FMSHRC __, No. CENT 2024-0122 (Dec. 4, 2024), I dissented and explained that Congress did not grant the Commission the authority to reopen final orders under section 105(a) of the Mine Act. The Commission's repeated invocation of Federal Rule of Civil Procedure 60(b) cannot overcome the statutory language. However, in *Belt Tech*, I explained in my concurrence that "the Act clearly states that to become a final order of the Commission, the operator must have received the notification from the Secretary." *Belt Tech, Inc.*, 46 FMSHRC __, No. WEVA 2024-0036 (Dec. 5, 2024) (citing *Hancock Materials, Inc.*, 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

In the instant case, as the Majority recounts, the operator received the final order. The Majority denies reopening in its opinion because the operator has not alleged good cause or provided a factual accounting for its failure to timely contest the penalties. Though I believe the Commission lacks the authority to consider motions to reopen, I concur with the Majority in denying reopening in this matter.

Moshe Z. Marvit, Commissioner

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