

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 6, 2023

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. CENT 2023-0192
ADMINISTRATION (MSHA)	:	A.C. No. 13-00095-572679
	:	
v.	:	
	:	
HEIDELBERG MATERIALS US	:	
CEMENT LLC,	:	

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

ORDER

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On May 17, 2023, the Commission received from Heidelberg Materials US Cement LLC (“Heidelberg”) 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 March 13, 2023. On March 19, 2023, Heidelberg timely contested five of the 38 proposed penalties contained in the assessment. The remaining 33 uncontested penalties therefore became final orders of the Commission 30 days later (April 12, 2023). On May 10, 2023, the Secretary of Labor filed a penalty petition for the five contested citations.

On May 17, 2023, the operator filed a motion to reopen three of the originally uncontested penalties.¹ Heidelberg alleges that it intended to contest those three citations, but failed to do so as a result of a mistake. As specified in an attached affidavit, the operator’s Safety Manager states that she omitted the fourth page of the assessment when scanning the documents, which led to her failure to contest citations listed on that page when transmitting the contest form to MSHA. The Secretary opposes the operator’s motion, alleging that Heidelberg does not provide a sufficient explanation of the mistake.

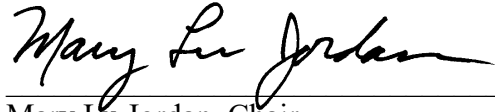
We find that the operator has established that it was acting in good faith. It timely filed a contest form, albeit incomplete, and then promptly filed the subject motion after receiving the penalty petition. The Secretary’s penalty petition was filed on May 10, 2023 and the operator’s motion to reopen was filed one week later. The timing of that filing appears to indicate that the operator reviewed the penalty petition, recognized its error, and moved to reopen before receiving a notice of delinquency. 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 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). Further, Heidelberg affirms that it submitted a position statement to MSHA addressing the allegations in Citation No. 9628458 (one of the citations subject to this motion), as part of a special investigation on March 16, 2023. The submission of this position statement is at least some circumstantial evidence of an intent to contest the citation.

Additionally, we find that the operator sufficiently explained the nature of the mistake, supported by a relevant affidavit. The Commission requires that “[a]t 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)). Here, the operator provided pertinent details including the party involved, relevant dates, and a clear explanation of procedures used to send contests. Accordingly, based upon the operator’s explanation of its procedures, its attentiveness upon receiving the penalty petition and quick action thereafter, we find that its failure to timely contest the citations on the fourth page of the assessment was the result of a good faith mistake, and not the result of unreliable procedures.

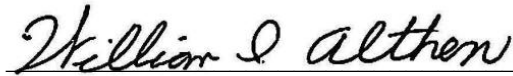
We therefore conclude that the operator has established good cause for its failure to timely file in these circumstances. In the interest of justice, we hereby reopen Citation Nos.

¹ The operator requests to reopen Citation Nos. 9628458, 9628337, and 9628453.

9628458, 9628337, and 9628453 and remand the matter 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



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner



Timothy J. Baker, Commissioner

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