

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 6, 2023

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 2023-0148
ADMINISTRATION (MSHA),	:	A.C. No. 33-01355-564439
	:	
v.	:	
	:	
SELECT MATERIALS	:	
	:	

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 April 11, 2023, Select Materials filed a motion to reopen the captioned case which 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).

Select Materials filed a *pro se* motion to reopen, contending that it did not receive the proposed assessment in the mail. The motion states that on March 14, 2023, the mine operator was first notified that it owed penalties when an MSHA inspector hand-delivered a delinquency letter to its mine site.¹

The Secretary opposes reopening these final orders. The Secretary demonstrates the U.S. Postal Service (“USPS”) originally attempted to deliver the proposed assessment via certified mail on October 8, 2022 to the operator’s address of record in Howard, Ohio. Thereafter, the operator was sent multiple notices indicating that the USPS was attempting to deliver certified mail. Sec’y Ex. B. On October 31, 2022, USPS returned the item to its sender after it went uncollected.

On January 20, 2023, the Secretary claims she sent the operator a delinquency notice. The Secretary then later hand-delivered a letter warning the operator that the Secretary would take additional enforcement actions if the operator did not remit payment of the penalties within 30 days. On April 10, 2023, MSHA issued the operator a citation alleging a failure to pay the penalties.² On April 11, 2023, the operator filed the subject motion to reopen.

After considering the operator’s motion and the Secretary’s opposition to that motion, we conclude that the operator has failed to fulfill its burden to demonstrate that its failure to timely file to contest was the result of a mistake, excusable neglect, or some other good cause reason.

The Commission requires that:

An operator seeking to reopen a proceeding after a final order is effective bears the burden of establishing an entitlement to extraordinary relief. 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. The operator must also identify which specific citations or orders in the assessment it wishes to contest upon reopening. Affidavits from persons involved in and knowledgeable of the situation and pertinent documents should be included with the request to reopen.

¹ The operator states that the letter contained an unfamiliar address and person in Texas; it speculates that these errors may have contributed to its failure to receive the original proposed assessment. There, however, is no evidence that the proposed assessment was mailed to the Texas address. To the contrary, the Secretary has provided detailed postal records demonstrating that delivery of the proposed assessment was attempted to the operator’s correct address in Howard, Ohio. Sec’y Ex. B.

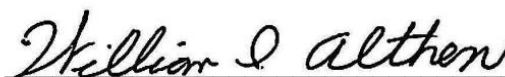
² On April 25, 2023, after receiving the citation, the operator paid the civil penalties.

Higgins Stone Co., Inc., 32 FMSHRC 33, 34 (Jan. 2010). Select Materials motion does contain the aforementioned information. The operator does not account for its failure collect the certified mailings after receiving multiple notices, including a notice that indicated that MSHA was attempting to deliver a package.³ Furthermore, the operator’s motion completely lacks a description of its normal personnel and processes used to receive and contest proposed assessments. Accordingly, it does not demonstrate that the failure to contest was not due to its own inadequate or unreliable procedures.⁴ Finally, the operator’s motion does not explain its delay in seeking to reopen after receipt of the January delinquency letter.

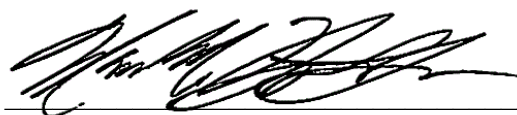
Because we conclude that the operator’s failure to contest was not the result of a good cause, its motion is DENIED with prejudice.



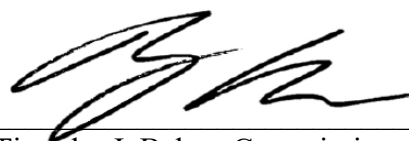
Mary Lu Jordan, Chair



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner



Timothy J. Baker, Commissioner

³ The Secretary notes that “[c]ertified Mail from MSHA almost certainly contains proposed penalty assessments.” 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).

⁴ The Commission has made it clear that where a failure results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *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)

Distribution:

Ronald Karns
Production Manager
26900 Coshocton Rd.
Howard, OH 43028
field@selectmaterials.net

Emily Toler Scott, Esq.
Counsel, Appellate Litigation
Division of Mine Safety and Health
Office of the Solicitor
U.S. Department of Labor
201 12th Street South – Suite 401
Arlington, VA 22202-5450
Scott.Emily.T@dol.gov

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

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