

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 16, 2024

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2023-0197
v.	:	A.C. No. 31-00212-573986 ²
	:	
ITAC ¹	:	

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

ORDER

BY: Jordan, Chair; Althen and Rajkovich, 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 5, 2023, the Commission received from ITAC, 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

¹ The operator’s motion to reopen refers to the operator as “Industrial TurnAround Corporation.” However, in its 2000-7 Legal Identity Report, the operator lists its name as “ITAC.” For the purposes of this proceeding, we will use “ITAC,” the operator’s official name on file with MSHA.

² The operator’s motion to reopen incorrectly lists number 31-00212-573989 in the caption, but the assessment attached to its motion is 31-00212-573986.

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 13203 N. Enon Church Road on April 3, 2023, and became a final order of the Commission on May 3, 2023. On June 20, 2023, MSHA sent ITAC a delinquency notice. ITAC explains that the proposed assessment was mailed to its former address, which has since been occupied by Rivers Bend East Office Group & Technology Center I, LLC (“Rivers Bend”). It states that on May 25, 2023, ITAC’s Senior Procurement Agent went to its former address to look for missing packages and was provided with a number of misplaced mail and packages kept in a locked office, including the assessment package. The operator hand-delivered the assessment package to ITAC’s Corporate Office Attendant, who delivered the package the next day to the appropriate personnel to handle the processing of the assessment.

On the next business day, May 30, ITAC contacted MSHA to notify MSHA of the circumstances involving the assessment package. MSHA informed the operator that because no contest had been received, a final order had been issued. ITAC also was informed that MSHA's address of record for the operator was the 13203 N. Enon Church Road address. ITAC began taking steps to prevent reoccurrence of this situation by updating its address of record with MSHA.

The Secretary opposes reopening. The Secretary argues that MSHA mailed the Proposed Penalty Assessment to the operator’s address of record and that a U.S. Postal Service delivery record indicates that the “item was delivered to an individual at the address” on April 3, 2023, and that the item was signed for by ITAC. The Secretary contends that the operator’s failure to fulfill its legal responsibility to update its address of record does not constitute excusable neglect warranting reopening.

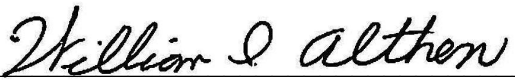
ITAC does not dispute that the assessment was mailed to the correct address of record. Corporate counsel for ITAC contacted Rivers Bend and confirmed that the locked office containing ITAC’s unclaimed mail belonged to an employee of Rivers Bend. ITAC has otherwise been unable to determine who signed for delivery of the assessment package. Thus, although USPS indicated that the assessment had been delivered to ITAC’s former address and “signed by ITAC,” the recipient of delivery is unclear. In addition, it appears that ITAC may not have been aware that its former address was listed as its address of record with MSHA since ITAC has received only two citations since 2009, including the citation at issue. Given that this is likely the contractor’s first contest of a citation in fourteen years, ITAC’s mistake in failing to update its address was an excusable one.


We note that the motion to reopen was timely filed once ITAC discovered the error. 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). Here, the motion to reopen was filed on June 5, 2023, within 30 days of having received the assessment package on May 25, and before the delinquency notification was received. Therefore, the motion was filed within a reasonable amount of time.

Having reviewed ITAC’s request and the Secretary’s response, we find that the operator has demonstrated good cause for its failure to timely respond and acted in good faith by timely filing its request to reopen. In the interest of justice, we hereby reopen this matter and remand it 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. We note, however, that a repeated failure to update one’s address of record would indicate an inadequate internal process and may result in future motions to reopen being denied. 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


Mateo M. Rajkovich, Jr., Commissioner

Commissioner Baker, dissenting:

I respectfully dissent.

Section 109(d) of the Mine Act requires each operator of a coal or other mine to file with the Secretary of Labor the name and address of such mine, the name and address of the person who controls or operates the mine, and any revisions in such names or addresses. 30 U.S.C. § 819(d). Under the authority granted by the Act, the Secretary has promulgated regulations requiring an operator to provide MSHA with, among other things, its correct address of record. 30 C.F.R. § 41.11. If any changes occur with respect to this information, an operator is required to notify MSHA of the change within 30 days of its occurrence. 30 C.F.R. § 41.12. Any failure by an operator to notify MSHA in writing of a change is considered a violation of Section 109(d) of the Act and subject to a civil penalty as provided in section 110 of the Act. 30 C.F.R. § 41.13. The regulations further provide:

Service of documents upon the operator may be proved by a post office return receipt showing that the documents could not be delivered to such address of record because the operator had moved without leaving a forwarding address or because delivery was not accepted at that address, or because no such address existed.

30 C.F.R. § 41.30.

In light of these statutory and regulatory requirements, the Commission has denied motions to reopen, in part, because the operator failed to maintain its correct address of record. *See Southwest Rock Products, Inc.*, 45 FMSHRC ___, No. WEST 2021-0275 (Aug. 30, 2023). In addition, the Commission has previously held 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. *See e.g. 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).

In the instant case, it is undisputed that the proposed assessment was delivered to the operator's address of record on April 3, 2023, and became a final order of the Commission on May 3, 2023. ITAC's excuse for its failure to respond to the proposed assessment in a timely manner is that it changed offices in 2009 without notifying MSHA. As a result, it did not learn about the assessment until May 25, 2023, when its Senior Procurement Agent went to its former address to look for missing packages. It was not until May 30, 2023, 14 years after the deadline, that ITAC contacted MSHA, and performed its legal obligation to update its address of record.

The operator's failure to update its address of record does not constitute excusable neglect. In fact, the explanation is itself an independent violation of the Mine Act that could have been cited. Rather than excuse the operator's failure to timely contest the citation, it compounds the error. Further, the operator's processing system amounted to allowing mail to pile up at the wrong

address for months at a time. Obviously, that is inadequate and unreliable and does not justify the operator's failure here. I note that the Secretary opposes reopening.

It is significant that the operator provided no justification for why it took 14 years to update its official address. The majority supplies its own justification for the operator's delay, noting, "it appears that ITAC may not have been aware that its former address was listed as its address of record with MSHA since ITAC has received only two citations since 2009, including the citation at issue."

Leaving aside the fact that the operator did not cite this information in support of its motion, I do not believe that the long gap between citations issued to the operator is relevant. An operator, under the relevant regulations, is defined as "any owner, lessee, other person who operates, controls, or supervises a coal or other mine or any designated independent contractor performing services or construction at such mine." 30 C.F.R. § 41.1(a). As a result, the regulations requiring operators to inform MSHA of a change of address (among other things) apply equally to all operators, including an operator that could be characterized as "infrequent." All operators must conform their behavior to the requirements of the Mine Act, and in the interest of fairness we must consider failure to comply with those requirements consistently.

Therefore, I would find that ITAC failed to establish good cause and I would deny ITAC's motion to reopen.



Timothy J. Baker, Commissioner

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