

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

March 9, 2023

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 2022-0119
	:	A.C. No. 04-00167-529152
OMYA, INC.	:	

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. (2012) (“Mine Act”). On January 11, 2022, the Commission received from Omya, Inc. (“Omya”) 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), 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).

The Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicates that the proposed assessment was delivered to the operator on February 10, 2021. The assessment became a final order of the Commission on March 12, 2021.

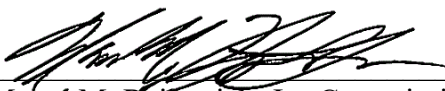
Omya asserts that it had always intended to contest the penalties, which is evidenced by its Notices of Contest filed on November 8, 2020. Omya subsequently received a combined invoice, which contained an outstanding balance and new penalties. However, believing that the notices of contest had preserved the operator’s contest rights, Omya’s Packaging Shipping Manager erroneously paid the penalties on March 19, 2021, in an effort to avoid a delinquency. The operator seeks reopening so that it may properly contest the penalties. Omya has not filed any other motions to reopen with the Commission in the last two years. The Secretary does not oppose the request to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed in accordance with MSHA’s regulations at 30 C.F.R. § 100.7 and the Commission’s procedural rules.

The Commission has granted requests to reopen where operators have mistakenly paid penalties and shown that they intended to contest the penalties or contested the underlying citations. See *Rockwell Mining, LLC*, 42 FMSHRC 793, 793-94 (Oct. 2020) (finding that operator sufficiently explained its failure to timely contest which was the result of excusable neglect); *Doe Run Co.*, 21 FMSHRC 1183, 1184-85 (Nov. 1999); *Cyprus Emerald Resources Corp.*, 21 FMSHRC 592, 592-93 (June 1999); compare *Sterling Sand & Gravel Co.*, 22 FMSHRC 935, 936 (Aug. 2000) (motion to reopen denied where operator failed to show that it intended to contest the penalty that was paid). In *Kaiser Cement Corporation*, the operator’s failure to contest a proposed assessment and its inadvertent payment of the penalties was determined to be the result of a processing error which the Commission reasonable found to qualify as “inadvertence” or “mistake.” *Kaiser Cement Corp.*, 23 FMSHRC 374, 375 (Apr. 2001); see also *Cyprus*, 21 FMSHRC at 593-94.

Having reviewed Omya's request and the Secretary's response, we find that due to an internal processing error, the operator failed to properly contest the penalty assessment. 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. 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

Commissioner Baker, dissenting:

Omya, Inc. received its proposed assessment in this matter on February 10, 2021 and that assessment became final on March 12, 2021. On or about March 19, 2021, Omya paid the outstanding amounts contained in the final assessment. On January 11, 2022, Omya filed the instant Motion to Reopen claiming both that it had mistakenly failed to contest the proposed assessment and had mistakenly paid the assessed penalty.

In the past, the Commission has 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). Further, the Commission has also held that an operator accidentally paying a citation it intends to contest amounts to such an inadequate or unreliable internal processing system and cannot form the basis for reopening. *See e.g. Pinnacle Mining Company, LLC*, 30 FMSHRC 1061 (Dec. 2008); *Moose Lake Aggregates*, 34 FMSHRC 1 (Jan. 2012); *Kuhlman Construction*, 34 FMSHRC 2894 (Nov. 2012); *Noranda Aluminum, LLC*, 37 FMSHRC 2731 (Dec. 2015); and *Enviro Care, Inc.*, 39 FMSHRC 819 (2017). Similarly, the Commission has found that in situations where the operator had already paid the penalty in full, a motion to reopen is moot. *See e.g. Riverton Investment Corp.*, 31 FMSHRC 1067

(Oct. 2009); *Performance Coal Co.*, 32 FMSHRC 466 (June 2010); *Marfork Coal Company*, 32 FMSHRC 1185 (Oct. 2010); *see also Lee Mechanical Contractors, Inc.*, 38 FMSHRC 44 (Jan. 2016) (Jordan, concurring).

In fact, the case where the Commission first recognized its ability to reopen cases under Rule 60(b) concerns an alleged mistaken payment. *Jim Walter Res., Inc.*, 15 FMSHRC 782, 789 (May 1993). In that case, the Commission concluded that administrative confusion caused by processing a large number of proposed penalty assessments does not excuse an operator from making deliberate litigation choices. *Id.* at 790. Further, the Commission noted that it is not a court of general equity and further that equity aids those who vigilantly pursue their own rights. *Id.*; *see also Pittsburg & Midway Coal Mining Company*, 15 FMSHRC 969 (Jun. 1993); *Monterey Coal Company*, 15 FMSHRC 997 (Jun. 1993); and *Mountain Coal Co.*, 15 FMSHRC 1012 (Jun. 1993).

In this case, Omya failed to timely contest a proposed penalty and then paid the amount owed. I do not believe it is accurate to characterize this action as a justifiable mistake or excusable neglect, as Omya took an affirmative step in making a payment. Instead, Omya's default and payment were the result of an inadequate or unreliable internal processing system. Omya's mistaken payment indicates that it has failed to vigilantly pursue its own rights.

Therefore, I would deny its motion to reopen.



Timothy J. Baker, Commissioner

Distribution:

Adele L. Abrams, Esq., CMSP
Law Office of Adele L. Abrams, P.C.
4740 Corridor Place, Suite D
Beltsville, MD 20705
Safetylawyer@gmail.com

Josh Schultz, Esq.
Law Office of Adele L. Abrams, P.C.
600 17th St #2800 South
Denver, Co. 80202
jschultz@aabramslaw.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
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov