FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 8, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. KIEWIT MINING GROUP	Docket No. WEST 2024-0270 A.C. No. 50-02102-598220

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

ORDER

BY: Jordan, Chair, and Baker, Commissioner

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 18, 2024, the Commission received from Kiewit Mining Group ("Kiewit") 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 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 U.S. Postal Service attemped delivery of the Proposed Penalty Assessment to Kiewit on April 29, 2024, but the mail was marked undeliverable as Kiewit had moved and left no forwarding address. The proposed assessment became a final order of the Commission on May 29, 2024.

Kiewit argues that it failed to timely contest the proposed penalties because it did not receive the proposed penalty assessment. It explains that its failure to receive the assessment was due to a miscommunication regarding when the operator's corporate office changed locations. The operator's project safety manager states that when he realized that the citations had become final, he immediately contacted an MSHA District Office. When he failed to receive the assessment information from the MSHA District Office, he contacted MSHA's Civil Penalty Compliance Office. On June 5, 2024, MSHA's Civil Penalty Compliance Office informed the operator that the penalties had become final orders, and Kiewit filed a motion to reopen. The project manager explains that since March 2024 when he became employed with the operator, he has been tracking violations to ensure that appropriate and timely actions are taken.

The Secretary opposes the motion to reopen.[1] She submits that the proposed assessment was sent to the operator's address of record, and that a failure to update an address of record is not good cause for reopening. The Secretary notes that the operator sought to change its address of record with MSHA on June 7, 2024, two days after the date of its motion to reopen. He asserts that Kiewit has provided no explanation for when its headquarters moved or why it failed to communicate its new address to MSHA in a timely manner. The Secretary argues that Kiewit's failure to provide an explanation of the problem that had occurred indicates that its internal processing system is inadequate or unreliable. She emphasizes that when filing its quarterly coal production and employment records since 2010, Kiewit did not update its address of record although it was prompted to do so as part of the filing process.

A party seeking to reopen a final penalty bears the burden of showing that it is entitled to such relief, through a detailed explanation of its failure to timely respond. *Revelation Energy, LLC*, 40 FMSHRC 375, 375-76 (Mar. 2018). General assertions or conclusory statements are insufficient. *Southwest Rock Prod., Inc.*, 45 FMSHRC 747, 748 (Aug. 30, 2023); *B & W Res., Inc*., 32 FMSHRC 1627, 1628 (Nov. 2010). At a minimum, the applicant 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. *Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010). Here, Kiewit provides vague statements about a miscommunication regarding when its corporate office changed locations, without identifying when the corporate office moved or any actions taken to update its address of record at that time.

As the Secretary stated, Kiewit was prompted to update its address of record each time it filed its quarterly coal production and employment reports. Sec'y Amended Opp'n at 11-13. The Commission has observed that a repeated failure by an operator to update its address of

[1] The Secretary filed an unopposed motion for an extension of time to file her opposition. We hereby grant the motion.

record could indicate an inadequate internal processing system. *See ITAC*, 46 FMSHRC 80, 81 (Feb. 2024) ("[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."), *appeal docketed*, No. 24-1058 (D.C. Cir. Mar. 11, 2024); *Dyno Nobel*, 46 FMSHRC 397, 398 (June 2024) (same), *appeal docketed*, No. 24-1236 (D.C. Cir. July 10, 2024). The Commission has made it clear 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. *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103. 104 (Feb. 2011).

Having reviewed Kiewit's request and the Secretary's response, we find that the operator has not provided sufficient explanation to justify reopening. Accordingly, we deny Kiewit's motion.

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, Inc.*, 46 FMSHRC 965 (Dec. 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 975, 977 (Dec. 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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