FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 12, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. PENN 2022-0116 A.C. No. 36-00091-552174
v.	:	
HANSON AGGREGATES PENNSYLVANIA LLC	:	

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

ORDER

BY: Jordan, Chair; Rajkovich and Baker, 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 August 3, 2022, the Commission received from Hanson Aggregates Pennsylvania LLC ("Hanson") a document deemed to be 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 a proposed assessment was issued to the operator on March 29, 2022. The Secretary claims that Hanson did not timely contest the proposed penalties, and the penalties became a final order of the Commission on May 9, 2022.[1] MSHA sent Hanson a delinquency notice on June 23, 2022. On August 3, 2022, the Commission received a notice of contest from Hanson, dated May 13, 2022, indicating Hanson's contest of six of the citations listed on the proposed penalty assessment. The Commission deemed the document received on August 3 to be a request to reopen.

[1] The Secretary did not state when she believes the proposed assessment was received by Hanson.

Because Hanson's document does not explain the company's failure to contest the proposed assessment on a timely basis and is not based on any of the grounds for relief set forth in Rule 60(b), we hereby deny the request for relief without prejudice. *See Lehigh Sw. Cement Co.*, 31 FMSHRC 595 (June 2009); *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007). The words "without prejudice" mean that Hanson may submit another request to reopen the assessment.[2]

Mary Lu Jordan, Chair

Marco M. Rajkovich, Jr., Commissioner

Timothy J. Baker, Commissioner

[2] If Hanson submits another request to reopen, it must establish good cause for not contesting the citations within 30 days from the date it received the citation from MSHA, and provide information about whether it has paid the penalties for the citations it chose not to contest. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Hanson should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. Hanson should also submit copies of supporting documents with its request to reopen.

Rule 60(c) of the Federal Rules of Civil Procedure provides that a Rule 60(b) motion must be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(c). Any motion to reopen filed by Hanson must comply with this timing requirement. In other words, if Hanson files a motion to reopen alleging mistake, inadvertence, or excusable neglect, the motion must be filed within a reasonable time and no later than one year after May 9, 2022.

Commissioner Althen, dissenting:

I respectfully dissent.

William I. Althen

William I. Althen, Commissioner

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