FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

May 19, 2021

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. SE 2019-0252-M
	:	A.C. No. 40-00798-492842
v.	:	
	:	
AMERICAN SAND COMPANY, LLC	:	

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY: 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 September 19, 2019, the Commission received from American Sand Company, LLC ("American Sand") a request 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"); *Jim Walter Res., Inc*., 15 FMSHRC 782, 786-89 (May 1993). 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 will be permitted. *See Coal Prep. Servs., Inc*., 17 FMSHRC 1529, 1530 (Sept. 1995).

The assessment at issue consists of four violations and their corresponding penalties.[1] The assessment was delivered to the operator on June 10, 2019. Subsequently, MSHA received a contest (a marked assessment form) from the operator for three of the penalties on June 28, 2019.[2] However, allegedly the fourth penalty, assessed for Citation No. 94228055, was not timely contested and therefore became a final order on July 10, 2019.

On August 15, 2019, the operator detailed its reasons for challenging the fourth penalty in a letter to the Commission; the letter was received by the Commission on August 23, 2019. Soon after, on August 26, 2019, MSHA mailed a delinquency notice to the operator; the delinquency notice was received by the operator on August 30, 2019.

The operator filed a motion to reopen the final order on September 19, 2019. The operator claims that the penalty at issue was timely contested. In support, the operator attaches a copy of the marked assessment form allegedly returned by the operator to MSHA. The Secretary filed an opposition to the motion to reopen on September 25, 2019, claiming that the operator failed to timely contest the penalty at issue, and that the operator informed MSHA that it would pay the penalty. In support, the Secretary attaches a different copy of the marked assessment form allegedly returned by the operator to MSHA.

The proposed assessment sent by MSHA contained four blank boxes, placed next to each corresponding violation and penalty. An operator could indicate a contest for any penalty by marking the corresponding blank box. The operator's version shows that all four boxes in the assessment were marked, indicating that all the penalties were timely contested.

In contrast, the Secretary's version shows that only three of the boxes were marked. In the Secretary's version, the fourth box for the penalty at issue remained unmarked, indicating that the fourth penalty was not timely contested.

However, only the Secretary's version included a page with the operator's signature, and a stamp which indicated the date and time of MSHA's receipt of the marked assessment. This shows that the Secretary's version is an accurate copy of the contest received by MSHA. Consequently, we find that the penalty at issue was not timely contested and therefore, became a final order of the Commission.

After reviewing the evidence, we nevertheless decide to reopen the final order because the operator implicitly provides a reasonable explanation for its delinquency and because it acted promptly after receiving the delinquency notice. In *Highland Mining Co.*, 31 FMSHRC 1313, 1317 (Nov. 30, 2009), the Commission required the operator to provide a reasonable explanation

[1] Assessment No. 000492842 consists of Citation Nos. 9428055, 9428056, 9428057, and 9428058. Despite this, the Secretary erroneously seems to imply that the assessment only covers two of these four citations ("MSHA's records show that Case Number 000492842 is for Citation Nos. 9428055 and 9428056, that were issued on June 6, 2019 (Attachment A)"). Sec's Opp. at 3.

[2] The Secretary mistakenly claims that MSHA received the operator's contest (the marked assessment form), which the Secretary characterizes as a hearing request, on July (rather than June) 28, 2019.

for its delinquency. The August 15 letter by American Sand to the Commission provides just such an explanation. The letter highlighted the operator's reasons for challenging the penalty for Citation No. 9428055, and was marked for Docket No. SE 2019-178, which was the related contest docket containing the other three violations.

The letter was sent after the assessment became a final order on July 10, 2019 but before the operator received the delinquency notice on August 30, 2019. The operator prepared the letter challenging the penalty and listed the letter under the related contest docket (SE 2019-178) because it was unaware that the penalty had become a final order. Therefore, the operator demonstrated a lack of knowledge of the final order and of the need to prepare a reopening request until it received the delinquency notice.

In *Pinnacle Mining Co.*, 38 FMSHRC 422 (Mar. 2016), we determined that the operator's unawareness that the penalty assessment was delinquent constituted a sufficient explanation for the operator's delay in filing a request to reopen. Similarly, here we determine that the operator's unawareness of the final order constitutes a reasonable explanation for its delinquency.

Moreover, under our precedent in *Highland*, 31 FMSHRC at 1316-1317, a motion to reopen is presumptively considered as having been filed within a reasonable amount of time if it is filed within 30 days of an operator's receipt of its first notification from MSHA of its failure to contest the penalty. As set forth above, the operator was unaware of the final order until it received the delinquency notice on August 30, 2019. The operator filed its motion to reopen on September 19, 2019. Therefore, the operator's motion to reopen was filed well within 30 days of the operator's receipt of its first notification from MSHA of the failure to contest the penalty.

Consequently, we find that the operator filed its motion to reopen within a reasonable amount of time. Having reviewed American Sand's request and the Secretary's response, we find that the operator's reasonable explanation for the delinquency and its request to reopen, filed fewer than 30 days after it received the delinquency notice, demonstrate the operator's good faith, and merit reopening of the case.

In the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded 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.

William I. Althen, Commissioner

Marco M. Rajkovich, Jr., Commissioner

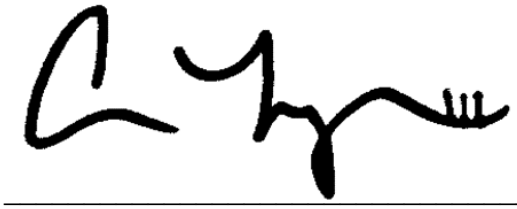
Chair Traynor, dissenting:

I must conclude that the operator has failed to demonstrate that granting its motion would be in the interest of justice. The operator's filings do not indicate any reason the operator introduced what it purported to be the proposed assessment form it transmitted to the Secretary – a form showing the fourth box was 'checked' indicating the operator's intent to contest the citation at issue. The apparently authentic form provided by the Secretary - which includes the operator's signature and the Secretary's file stamp indicating the date the form was received - clearly shows the fourth box is not checked. The operator does not supply and I cannot see on the record before me a plausibly benign explanation for this discrepancy between the document the operator put forward and the authentic document provided by the Secretary.

> Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.

Hanover Ins. Co. v. United States, 146 Fed. Cl. 447, 450 (2019) (quoting *United States v. Shaffer Equipment Co.*, 11 F.3d 450, 457 (4th Cir. 1993)).

Though the operator filed its motion in a timely fashion and might otherwise be entitled to the relief sought, the apparent attempt to introduce an inauthentic document prevents me from concluding the motion is made in good faith or that the interests of justice are served by granting the motion.



Arthur R. Traynor, III, Chair

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