

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N

WASHINGTON, DC 20004-1710

**JUN 19 2019**

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),

v.

STONE ZONE

- : Docket No. CENT 2018-412-M
- : A.C. No. 41-04718-456977
- :
- : Docket No. CENT 2019-237-M
- : A.C. No. 41-04718-361889
- :
- : Docket No. CENT 2019-238-M
- : A.C. No. 41-04718-367048
- :
- : Docket No. CENT 2019-239-M
- : A.C. No. 41-04718-389316
- :
- : Docket No. CENT 2019-240-M
- : A.C. No. 41-04718-392027
- :
- : Docket No. CENT 2019-241-M
- : A.C. No. 41-04718-399316
- :
- : Docket No. CENT 2019-242-M
- : A.C. No. 41-04718-399406
- :
- : Docket No. CENT 2019-243-M
- : A.C. No. 41-04718-401278
- :
- : Docket No. CENT 2019-244-M
- : A.C. No. 41-04718-410608
- :
- : Docket No. CENT 2019-245-M
- : A.C. No. 41-04718-429077
- :
- : Docket No. CENT 2019-246-M
- : A.C. No. 41-04718-438742
- :
- : Docket No. CENT 2019-247-M
- : A.C. No. 41-04718-454777

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On August 8, 2018, the Commission received from Stone Zone a motion seeking to reopen twelve penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup>

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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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 Secretary asserts that the proposed assessments in Docket Nos. CENT 2019-237-M, CENT 2019-238-M, CENT 2019-239-M, CENT 2019-240-M, CENT 2019-241-M, CENT 2019-242-M, CENT 2019-243-M, CENT 2019-244-M, CENT 2019-245-M, and CENT 2019-246-M were delivered to the operator’s address of record and became final orders between October 22, 2014 and July 2017, when Stone Zone failed to contest the proposed penalties after 30 days.

Rule 60(c) of the Federal Rules of Civil Procedure provides that a Rule 60(b) motion shall 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). The motion to reopen was filed more than one year after the aforementioned cases became final orders. Therefore, under Rule 60(c), Stone Zone’s motion is

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<sup>1</sup> For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers CENT 2018-412-M, CENT 2019-237-M, CENT 2019-238-M, CENT 2019-239-M, CENT 2019-240-M, CENT 2019-241-M, CENT 2019-242-M, CENT 2019-243-M, CENT 2019-244-M, CENT 2019-245-M, CENT 2019-246-M, and CENT 2019-247-M, involving similar procedural issues. 29 C.F.R. § 2700.12.

untimely as it pertains to those cases. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

However, the motion to reopen was timely filed in regard to Docket Nos. CENT 2018-412-M and CENT 2019-247-M. The Secretary states that in CENT 2019-247-M the proposed assessment was delivered on January 13, 2018 and became a final order of the Commission on February 12, 2018. According to the Secretary, in CENT 2018-412-M, the proposed assessment was delivered on February 17, 2018 and became a final order of the Commission on March 19, 2018.

Stone Zone asserts that it received all twelve of the proposed penalty assessments from the Department of Labor's Mine Safety and Health Administration ("MSHA") but that it filed them away with the intention to contest and/or pay all of the penalties at a later date. Stone Zone further avers that its failure to timely contest was not a result of "indifference, or inattention, inadequate or unreliable office procedures of general carelessness." Rather, Stone Zone maintains that such failure was a product of not understanding that there was a "30 day window" for contesting proposed penalties.

The Secretary opposes the request to reopen, arguing that Stone Zone has failed to provide a valid reason to excuse its delinquency. The Secretary notes that Stone Zone admits that it received the proposed penalties and that MSHA inspectors specifically advised the operator to contest the penalties. Moreover, the Secretary implies that Stone Zone is not acting in good faith, only filing a motion to reopen after receiving a citation for failing to pay its penalties and a subsequent withdrawal order for substantial delinquent payments. The Secretary further argues that, in seeking to reopen these cases, Stone Zone is attempting to rescind on a recent agreement with MSHA to pay off its delinquent penalties in a series of monthly installments.

In regards to good faith, it is well recognized in federal jurisprudence that the issue of whether the movant acted in good faith is an important factor in determining the existence of excusable neglect. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993); *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006). Likewise, the Commission has recognized that a movant's good faith, or lack thereof, is relevant to a determination of whether the movant has demonstrated mistake, inadvertence, surprise or excusable neglect within the meaning of Rule 60(b)(1) of the Federal Rules of Civil Procedure. *Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3346 (Nov. 2013); *M.M. Sundt Constr. Co.*, 8 FMSHRC 1269, 1271 (Sept. 1986); *Easton Constr. Co.*, 3 FMSHRC 314, 315 (Feb. 1981). Some of the factors relevant to the good faith analysis are the number of delinquent penalties outstanding, the period of time the delinquent penalties accrued, and the seriousness of the citations underlying the aforementioned penalties. *Kentucky Fuel Corp.*, 38 FMSHRC 632, 633 (Apr. 2016). *See also Oak Grove Res. LLC*, 33 FMSHRC 1130, 1132 (June 2011).

According to the Installment Payment Agreement that Stone Zone entered into on July 3, 2018, Stone Zone owed MSHA a total amount of \$214,756.95 in delinquent penalties, interest, and fees for civil penalties issued between 2010 and 2018. Of the 12 cases involved in the

present motion to reopen, Stone Zone is seeking to reopen 58 citations and orders, 14 of which were issued under section 104(d) of the Mine Act.<sup>2</sup> In addition, we note that Stone Zone only filed a motion to reopen after MSHA issued a citation for failure to pay its penalties and section 104(b) withdrawal order for delinquent payments. Moreover, Stone Zone had already entered into an agreement with MSHA to pay all outstanding penalties a month before filing the motion to reopen.

These facts are clearly not consistent with an operator acting in good faith. The operator's record indicates that it has repeatedly disregarded final penalty assessments for many years. The large amount of penalties, which had accumulated in the years preceding the request to reopen, should have informed the operator of the need to be more attentive to proposed assessments from MSHA. Therefore, the operator should have taken precautions, due to the serious violations and high penalties at issue, to timely contest the proposed assessment.

Finally, 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); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008). It is the operator's responsibility to read any information provided by MSHA in connection with a proposed assessment. In particular, the Secretary attaches to each proposed penalty a document titled *Notice of Contest Rights and Instructions* which clearly states in its first sentence that, "[p]ursuant to 30 CFR 100.7, you have 30 days from receipt of this proposed assessment to either (1) pay the penalty or penalties . . . or (2) notify MSHA that you wish to contest some of all of the proposed assessments. . . ."


Here, it is clear that Stone Zone operated for years without a process in place to review and contest proposed penalties. Rather, it appears that it was the operator's longstanding practice to simply file away the proposed assessments without reviewing the penalties or the *Notice of Contest Rights and Instructions* which accompany each assessment.

We have reopened final orders where an operator, though unfamiliar with contesting procedures, demonstrated a genuine interest to understand its obligations and liabilities under the Mine Act and act on such obligations. However, Stone Zone has provided no evidence that it attempted to follow up or seek clarification from MSHA or the Department of Treasury as to the deadline to contest the penalties. It strains credibility to believe that Stone Zone could operate for years under the mistaken belief that it could contest MSHA penalties years after they were proposed.

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<sup>2</sup> The orders issued pursuant to section 104(d) were for unwarrantable failure to comply with mandatory health and safety standards. See 30 U.S.C. § 814(d).

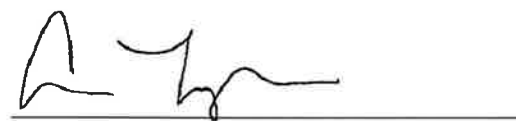
Accordingly, we find that the operator has failed to demonstrate an entitlement to extraordinary relief, and thus we deny Stone Zone's motion.

  
Marco M. Rajkovich, Jr., Chairman

  
Mary Lu Jordan, Commissioner

  
Michael G. Young, Commissioner

  
William I. Althen, Commissioner

  
Arthur R. Traynor, III, Commissioner

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