

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

July 10, 2024

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE 2023-0254
ADMINISTRATION (MSHA)	:	A.C. No. 38-00749-571990
	:	
v.	:	Docket No. SE 2023-0255
	:	A.C. No. 01-03411-570549
LOPKE QUARRIES, INC.	:	
	:	Docket No. SE 2023-0256
	:	A.C. No. 38-00749-572191

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

ORDER

BY: THE COMMISSION

These cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”).¹ On September 21, 2023, the Commission received from Lopke Quarries, Inc., (“Lopke Quarries”) a motion to reopen final orders of the Commission pursuant to section 105(a) of the 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

¹ The Commission consolidates these proceedings pursuant to Commission Procedural Rule 12, 29 C.F.R. § 2700.12, for the limited purpose of addressing the motion to reopen.

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).

In response to the motion, the Department of Labor's Mine Safety and Health Administration ("MSHA") has provided the following information regarding the status of these final orders.

The proposed assessment in Docket No. SE 2023-0254 was delivered to the operator on March 6, 2023. The assessment contained 11 citations with an aggregate proposed penalty of \$7,550. The operator timely submitted payment for one of the citations at issue. The remaining penalties became final orders of the Commission on April 5, 2023. MSHA sent the operator a delinquency notice on May 22, 2023.

The proposed assessment in Docket No. SE 2023-0255 was delivered to the operator on February 6, 2023. The assessment contained 18 citations with an aggregated proposed penalty of \$24,154. The operator timely paid the penalty for one of the citations at issue. The remaining penalties became final orders of the Commission on March 8, 2023. MSHA sent the operator a delinquency notice on April 24, 2023.

The proposed assessment in Docket No. 2023-0256 was delivered to the operator on March 6, 2023. A \$21,029 penalty was assessed for a single citation. The operator did not submit timely payment and it became a final order of the Commission on April 5, 2023. MSHA sent the operator a delinquency notice on May 22, 2023.

On approximately July 18, 2023, MSHA delivered a "scofflaw" letter to Lopke Quarries, which stated that the Secretary may take additional enforcement actions if the operator fails to submit payment of its unpaid penalties. Lopke Quarries did not pay. On August 29, 2023, MSHA issued Citation No. 9708285, directing the operator to either submit payment or to enter into an installment agreement by September 28, 2023. Instead, on September 21, 2023, the operator filed the subject motion with the Commission.

On October 2, 2023, MSHA issued a section 104(b) withdrawal order to Lopke Quarries, alleging a failure to abate Citation No. 9708285. On October 04, 2023, MSHA received a payment from Lopke Quarries in the amount of \$48,932.²

Lopke Quarries General Superintendent Mike Lindhorst filed the motion with the Commission *pro se*. The motion states that the operator attempted to timely contest the proposed assessments, but mistakenly mailed the contest forms along with the civil penalty payments to MSHA's payment center. The operator further alleges that it contacted MSHA after receiving a delinquency notice and was informed of its mistake. Mr. Lindhorst states that he attempted to reopen the penalties, but initially erroneously directed his motion to MSHA rather than the

² The Secretary represents that although the operator submitted payment, she does not believe that Lopke Quarries motion to reopen is moot; payment was submitted in response to the issuance of the section 104(b) order to withdraw miners from the mine. Sec'y Response at 5 n.2.

Commission as is required. Finally, the operator asserts that it was unfamiliar with the contest process, as it normally pays assessments.

The Secretary opposes reopening the final orders, alleging that the operator failed to provide a detailed accounting of its attempts to timely file and, additionally, has failed to provide a reason for its delay in seeking to reopen. She alleges that by waiting until the Secretary threatened to take enforcement actions to collect, before filing a motion to reopen, the operator demonstrated a lack of good faith.

Here, the operator asserts that its failure to timely file was due to a general lack of understanding of the contest process, two specific mistakes (mailing its contests to the payment center and mailing its first request to reopen to MSHA), and additional “smaller factors.” We do not find that this series of issues constitutes excusable error or inadvertence and note that it may reflect an inadequate or unreliable processing system, which would be grounds to deny the motion to reopen. *See, e.g., Pinnacle Mining Co. LLC*, 30 FMSHRC 1066, 1067 (Dec. 2008).

Moreover, “[m]otions to reopen received within 30 days of an operator’s receipt of its *first notice* from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time.” *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (emphasis added). Conversely, motions filed more than 30 days after such notice should include an explanation as to why the operator waited so long to file for reopening. The lack of such an explanation is grounds for the Commission to deny the motion. *Id.*

Here, the operator received its first notice from MSHA in April and May 2023, when it was sent delinquency notices, and its second notice in July when it was sent a scofflaw letter. However, the operator did not file for reopening until September 21, 2023. Some of this delay was apparently due to the initial misfiling of the request to reopen with MSHA. However, emails provided by the operator show that Lopke Quarries did not even reach out to MSHA until August 8, 2023, approximately three months after being notified that the assessments had become final. The operator has not explained this delay.³

We conclude that Lopke Quarries has failed to establish good cause for its failure to timely file to contest the proposed assessments; its motion does not demonstrate exceptional circumstances and the operator has failed to adequately explain its delay in seeking to reopen after it became aware of its errors.

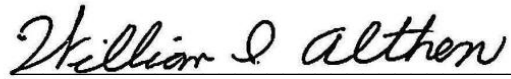
Finally, the operator’s motion omits mention that it received Citation No. 9708285 on August 29, 2023, after failing to pay the civil penalties owed, and then filed the motion with the Commission. It is well recognized that a movant’s good faith or lack thereof is an important factor in determining whether good cause exists to reopen a final order. *See, e.g., Stone Zone*, 41 FMSHRC 272, 274 (June 2019) (citations omitted).

³ Lopke Quarries states generally that it believed MSHA handled scheduling and would reach out when the matters were due to be heard. However, this does not explain why the operator *continued* to wait after MSHA sent delinquency letters.

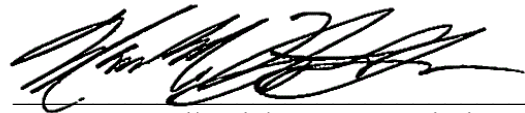
Based upon these reasons, Lopke Quarries' motion is DENIED.



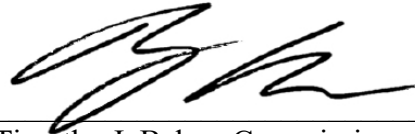
Mary Lu Jordan, Chair



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner



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