

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

July 11, 2023

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2023-0003
v.	:	A.C. No. 36-00128-556080
	:	
HIGHWAY MATERIALS, INC.	:	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, 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. (2018) (“Mine Act”). On October 6, 2022, the Commission received from Highway Materials, Inc. (“Highway Materials”) 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 proposed assessment was delivered on June 3, 2022, and became a final order of the Commission on July 5, 2022.

Highway Materials alleges that on December 8, 2021, its Safety Coordinator “contested” Citation Nos. 9660855, 9660858, and 9660854 by requesting a conference with an MSHA Conference Litigation Representative (“CLR”). The conference took place on March 3, 2022, and the CLR informed the operator that he would subsequently inform the operator of his findings regarding the citations. The operator subsequently received a proposed assessment dated June 1, 2022, proposing civil penalties for the three citations. On June 9, 2022, Highway Materials contacted MSHA about the conference results. The operator did not receive a response from MSHA until August 17, 2022. On August 17, Material Highways received a “conference results letter” indicating that the citations should remain as issued. On August 18, MSHA mailed a delinquency notice to Highway Materials.

The operator states that it believed that it had 30 days from the date of the conference results letter to submit a contest of the proposed penalties, and filed a contest on September 8, 2022, with the Commission. After MSHA eventually received a copy of Highway Material’s contest, it informed the operator by email dated September 21, 2022, that the contest was untimely.

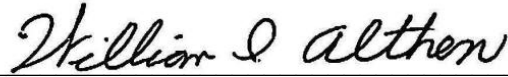
Contrary to Highway Material’s belief, a contest of proposed penalties must be filed with MSHA, rather than the Commission, within 30 days of the operator’s receipt of the proposed penalty assessment, rather than receipt of the conference results letter.¹ 30 U.S.C. § 815(a); 29 C.F.R. § 2700.26. The Secretary does not oppose the request to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed in accordance with MSHA’s regulations at 30 C.F.R. § 100.7 and the Commission’s procedural rules.

¹ As the Secretary noted in her response, notices of contests of proposed penalties should be mailed to MSHA’s Civil Penalty Compliance Office, 201 12th Street South, Suite 401, Arlington, VA 22202.

Having reviewed Highway Material's request and the Secretary's response, we find there is sufficient evidence that mistakes were made, thus satisfying the Rule 60(b) criteria. *See Keystone Cement Co.*, 32 FMSHRC 1040 (Sept. 2010); *Hanson Aggregates Midwest, LLC*, 31 FMSHRC 1292 (Nov. 2009); *South Ridge Granite Quarry*, 31 FMSHRC 873 (Aug. 2009). We find that Highway Materials acted diligently in attempting to discern the status of the penalties and promptly in filing its motion to reopen upon discovery of its error. The operator's good faith is demonstrated by its extensively documented contacts with MSHA and the Secretary's non-opposition. In the interest of justice, we hereby reopen this matter and remand it 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.



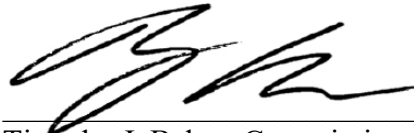
Mary Lu Jordan, Chair



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner



Timothy J. Baker, Commissioner

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