FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 24, 2024

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 2024-0155
ADMINISTRATION (MSHA)	:	A.C. No. 12-00064-593013
	:	
v.	:	
	:	
BRAND INDUSTRIAL SERVICES, LLC	:	

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

ORDER

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

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On April 9, 2024, the Commission received from Brand Industrial Services, LLC ("Brand") a motion to reopen a final order 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 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 to the operator on January 30,

2024, and became a final order of the Commission on February 29, 2024, after Brand did not contest the penalties.

On March 5, 2024, Brand emailed MSHA and attempted to contest the proposed assessment. MSHA rejected Brand's contest because it was filed five days late. Thereafter, on April 9, 2024, Brand filed the subject motion to reopen.

Brand alleges that it failed to timely contest the assessment because an employee mistakenly misrouted the assessment to an incorrect department. Brand alleges that this initial mistake was compounded because MSHA did not provide the company with copies of the citations until February 20, 2024, when MSHA forwarded it a duplicate copy of the assessment.

The Secretary opposes reopening, stating that the citations were properly issued to the operator. The Secretary states that the operator's abatement of the violative conditions identified in the citations indicates that the operator received the citations upon issuance. Furthermore, the Secretary alleges that her records indicate that the assessment was properly delivered and signed for. The Secretary also alleges Brand's motion fails to address why it did not contest the assessment after MSHA forwarded it the duplicate copy.[1] The Secretary maintains that the facts indicate that the company has inadequate or unreliable internal procedures.

When filing a motion to reopen before the Commission the operator bears the burden of showing exceptional circumstances. *Lone Mountain Processing, Inc*., 35 FMSHRC 3342, 3345 (Nov. 2013). "[T]he applicant for such relief must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure. . . ." *Lone Mountain,* 35 FMSHRC at 3345 (*citing Higgins Stone Co*., 32 FMSHRC 33, 34 (Jan. 2010)).

However, it is also well established that an inadequate or unreliable internal processing system does not constitute inadvertence, mistake or excusable neglect so as to justify the reopening of an assessment which has become final under section 105(c) of the Mine Act. *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co*., 31 FMSHRC 1313, 1315 (Nov. 2009): *Double Bonus Coal Co*., 32 FMSHRC 1155, 1156 (Sept. 2010); *Elk Run Coal Co*., 32 FMSHRC 1587, 1588 (Dec. 2010).

We conclude that, in this instance, the initial mishandling of the assessment and the resulting missed filing deadline was the result of excusable neglect and not the result of an unreliable internal processing system. Brand provided a clear and detailed explanation of its error and its belated attempt to file. In finding good cause for its failure to timely contest, we rely upon the operator's attempt to file only five days after the filing deadline and upon the operator's prompt filing of a motion to reopen. An operator's good faith efforts militate in favor of reopening. *See, e.g., Stone Zone*, 41 FMSHRC 272, 274 (June 2019) ("It is well recognized

[1] The Secretary states that the duplicate copy was provided to the operator by email after an additional copy of the assessment, mailed to a miner's representative, was returned to MSHA as "undeliverable." Sec'y Resp. at 3.

that a movant's good faith or lack thereof is an important factor in determining whether good cause exists to reopen a final order.").[2]

In the interest of justice, we hereby reopen the captioned assessment and remand the matter 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

[2] On May 23, 2024, Brand filed a motion for leave to file a reply to the Secretary's response. We hereby GRANT Brand's motion for leave. We have considered Brand's reply.

Commissioner Marvit concurring,

Though I am in agreement with the arguments contained in the Secretary's Motion in Opposition, I concur in the decision to reopen this case. I do so out of fairness to the operator because the Commission has historically granted reopening based on facts similar to those contained here. Absent this history, I would have voted to deny reopening.

Moshe Z. Marvit, Commissioner

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