

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 21, 2023

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2023-0051
ADMINISTRATION (MSHA)	:	A.C. No. 10-02177-557454
	:	
v.	:	Docket No. WEST 2023-0053
	:	A.C. No. 10-02177-559239
KIEWIT MINING GROUP	:	

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

ORDER

BY: Jordan, Chair; Althen and Rajkovich, Commissioners

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On November 30, 2022, the Commission received from Kiewit Mining Group (“Kiewit”) two motions seeking to reopen 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).¹

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 For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers WEST 2023-0051 and WEST 2023-0053 because they involve similar factual and procedural issues. 29 C.F.R. § 2700.12.

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).

Kiewit explains that all correspondence for the mine is automatically routed to the Post Office in Soda Springs, Idaho, where it is held for twice-weekly pickup by a mine employee. Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) and the U.S. Postal Service indicate the assessment in Docket No. WEST 2023-0051 was available for pickup at the Soda Springs Post Office on June 30, 2022, and the assessment in Docket No. WEST 2023-0053 was available for pickup on July 25, 2022. The assessments were returned to the Secretary as unclaimed approximately two weeks later. The assessments became final orders of the Commission on August 1, 2022, and August 24, 2022, respectively.²

Delinquency notices were sent to the operator on October 11 and November 4, 2022. On November 7, Kiewit reached out to MSHA for more information regarding the status of assessments. MSHA provided the operator with the USPS delivery date information and copies of the assessments on November 15, and Kiewit filed its motions to reopen on November 30.

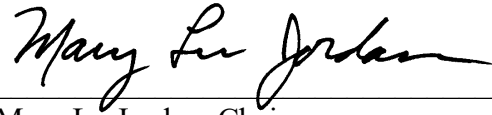
Kiewit was unable to identify the specific cause of the failure to collect the assessment packages. However, the operator assures the Commission that its office procedures are normally reliable and that the Post Office is routinely checked twice a week. Kiewit notes that it has never before been untimely in filing a notice of contest. The Secretary does not oppose the operator’s requests to reopen.

In light of Kiewit’s history, we find that this mistake does not indicate an inadequate processing system, and is unlikely to recur. We also note that the operator followed up with MSHA and filed its motions to reopen within a reasonable amount of time.³ We also recognize that mail delivery during the relevant period was affected by the unprecedented strain of the COVID 19 pandemic. Having reviewed Kiewit’s requests and the Secretary’s responses, we find that the operator’s failure to timely file was the result of excusable mistake.

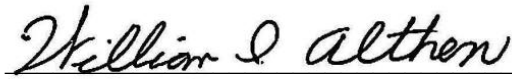
² The Commission has previously found motions to reopen to be moot where an operator never received the relevant assessment. *E.g., Delhur Industries, Inc.*, 43 FMSHRC 396 (Aug. 2021). While the assessments at issue here technically never reached the operator’s property, we find this case to be distinguishable. The assessments reached the operator’s designated location for all mail delivery, akin to a P.O. Box or off-site office.

³ The Commission has previously held that “[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). Here, the operator was provided with the USPS records and copies of the citations on November 15, 2022, and the motions to reopen were filed on November 30, 2022.

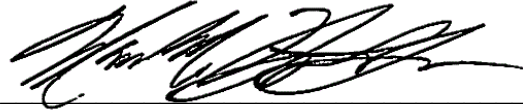
In the interest of justice, we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment 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

Commissioner Baker, dissenting in part:

In this case, Kiewit failed to timely contest the proposed penalty at issue in Docket No. WEST 2023-0051, and then paid the amount owed. For the reasons set forth in my dissent in *Omya Inc.*, 45 FMSHRC __, 2023 WL 2559811 (Mar. 9, 2023), I do not believe it is accurate to characterize this action as a justifiable mistake or excusable neglect.

Therefore, I would deny Kiewit's motion to reopen with respect to Docket No. WEST 2023-0051.

A handwritten signature in black ink, appearing to read 'TJ Baker', written over a horizontal line.

Timothy J. Baker, Commissioner

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