

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 25, 2022

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. PENN 2022-0083
ADMINISTRATION (MSHA) :
 :
 :
v. :
 :
 :
CONSOL PENNSYLVANIA COAL :
COMPANY, LLC :

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On May 25, 2022, the Commission received from Consol Pennsylvania Coal Company, LLC a motion seeking to permit late filing to contest an order issued pursuant to section 107(a) of the Mine Act, 30 U.S.C. § 817(a), and 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 107(e)(1) of the Mine Act, an operator who wishes to contest an order issued pursuant to section 107(a) may request review by the Commission no later than 30 days after being notified of such order. 30 U.S.C. § 817(e)(1). Commission Procedural Rule 9 allows the Commission to extend the filing time for a document for good cause shown. 29 C.F.R. § 2700.9(a). The rule allows the Commission to grant motions for extensions of time after the designated filing time has expired if the party requesting the extension can show, in writing, the reasons for its failure to make the request before the filing deadline. 29 C.F.R. § 2700.9(b).

Relying on Rule 60(b) of the Federal Rules of Civil Procedure, we have 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, appropriate proceedings on the merits may be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). We find that the same considerations apply to the order here under Commission Procedural Rule 9. *See e.g., Jones Bros MFG, Inc.*, 38 FMSHRC 234, 235 (Feb. 2016).

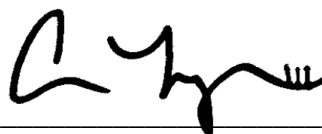
The subject section 107(a) order, Order No. 9204789, was issued on February 9, 2022. The deadline for contesting the order pursuant to section 107(e)(1) was March 11, 2022. Consol states that it neglected to timely file a contest to the order with the Commission because it instead was attempting to meet with Mine Safety and Health Administration (“MSHA”) officials

to resolve the matter. The Secretary does not oppose Consol's motion to permit late filing. However, the Secretary notes that Consol is a large operator, familiar with the Commission's procedural rules, and Consol's motion neither provides an explanation as to why it did not file a timely contest with the Commission, nor is the motion accompanied by a declaration.

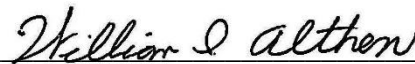
Consol also moves to reopen Citation Nos. 9204790, 9204791 and 9204793. The Commission possesses jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to 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 on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. 29 C.F.R. § 2700.1(b) ("the Commission . . . shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787.

Of the three citations, only Citation No. 9204793 has become a final order of the Commission.¹ Consol originally did not contest the penalty for Citation No. 9204793 in proposed assessment number 000552311. Instead, Consol timely paid the full \$133 civil penalty for Citation No. 9204793. Consol did however timely contest ten other citations that were included within proposed assessment number 000552311, and those ten contested citations are now before a Commission Administrative Law Judge in Docket No. PENN 2022-0069. Nevertheless, the Secretary does not oppose Consol's motion to reopen the citation.

Accordingly, in the interests of justice, we hereby remand Consol's motion to permit late filing to the Chief Administrative Law Judge for a determination of whether good cause exists for the operator's failure to timely contest Order No. 9204789 with the Commission. In addition, we also remand Consol's motion to reopen Citation No. 9204793 to the Chief Judge for a determination of whether good cause exists for the operator's failure to timely contest the proposed assessment.



Arthur R. Traynor, III, Chair



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner

¹ Citation No. 9204790 has not yet been assessed a civil penalty (www.msha.gov/mine-data-retrieval-system, last visited August 23, 2022). Consol may obtain Commission review of the citation by contesting the proposed penalty after it is assessed. Furthermore, Citation No. 9204791 was timely contested by Consol and is currently before a Commission Administrative Law Judge in Docket No. PENN 2022-0112.

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