

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

September 9, 2024

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2024-0008
v.	:	A.C. No. 36-05205-584939
	:	
GEORGETOWN SAND & GRAVEL,	:	
INC.	:	

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

ORDER

BY: Baker and Marvit, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On November 2, 2023, the Commission received from Georgetown Sand & Gravel, Inc. (“GS&G”) 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).

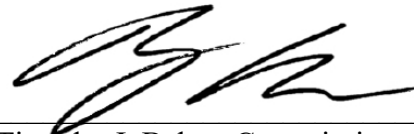
Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered to the Post Office where the operator receives mail on September 23, 2023, and became a final order of the Commission on October 23, 2023.

GS&G asserts that it retrieved the proposed assessment from the Post Office on Monday, September 25, and filed its contest of the proposed penalty 30 days later on October 25. GS&G notes that it could not have retrieved the assessment earlier than September 25, because the mine does not operate on Saturdays and the Post Office is closed on Sundays. Finally, GS&G asserts that contrary to MSHA’s usual practices, the assessment package was not sent via ‘certified’ mail. The Secretary opposes the motion to reopen. She primarily asserts that the operator has failed to explain why its contest was not timely filed or how the asserted non-certified delivery impacted GS&G’s ability to timely process the assessment.¹

An operator seeking to reopen a final penalty bears the burden of showing that it is entitled to such relief. In addition to providing all known details, including relevant dates and persons involved, the operator must provide a clear explanation that accounts for the operator’s failure to timely contest the assessment. *Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010). Here, GS&G has not explained why its contest was not timely. The operator has explained why the assessment was retrieved two days after it was delivered, but has not explained why a delay in *retrieving* the assessment resulted in a delay in *contesting* the assessment.

GS&G has not adequately justified its failure to timely contest the proposed assessment. Accordingly, GS&G’s motion to reopen is DENIED WITHOUT PREJUDICE. This means we have denied the motion, but the operator may refile the motion with additional information.

We note that motions to reopen must be made no more than a year after the relevant order has become final. Fed. R. Civ. P. 60(c). Here, the proposed assessment became final on October 23, 2023. Accordingly, the one year period for filing any amended request to reopen the assessment expires on October 23, 2024.



Timothy J. Baker, Commissioner



Moshe Z. Marvit, Commissioner

¹ The Secretary does not expressly admit or deny GS&G’s assertion that the assessment was sent via non-certified mail. We note that the requirement for the Secretary to send proposed assessments by certified mail is not optional. 30 U.S.C. § 815(a).

Chair Jordan, dissenting:

I dissent from the majority's decision. I would find, based upon the asserted facts and pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a), that the proposed civil penalty assessment became a final order of the Commission on October 25, 2023. Accordingly, the operator's filing to contest the penalties with MSHA, on October 25, 2023, was timely submitted.

In the alternative, even assuming that the assessment became final on October 23, 2023, as my colleagues conclude, I would find that the operator has asserted a good cause reason for the late filing.

1. The assessment became a final order of the Commission on October 25, 2023.

Section 105(a) of the Mine Act requires that the Secretary issue proposed civil penalty assessments "by certified mail" and provides the operator "30 days from the *receipt* of the notification issued by the Secretary" to contest the civil penalties. 30 U.S.C. § 815(a) (emphasis added). Certified mail requires a signature from the recipient.² Therefore, according to the plain language of section 105(a), receipt of the proposed assessment is effective upon *signed* receipt.

Here, the record reflects that the proposed assessment was delivered to the operator's post office box on Saturday, September 23, 2023. The operator asserts and the Secretary's exhibit reflects that it received the assessment on Monday, September 25, 2023. Accordingly, the operator had until October 25, 2023, to timely contest the assessment. The Secretary improperly rejected the operator's attempt to contest the penalties on October 25.

The Secretary misconstrues the requirements of the Mine Act, and the operator's motion, when she contends that the operator fails to assert how the method of delivery contributed to GS&G's failure to contest within 30 days of the assessment's arrival. Sec'y Resp. at 6. GS&G's motion asserts that it believed that it had filed to contest the penalties "within the allowable timeframe" when it filed to contest within 30 days of its receipt of the assessment. Mot. at 2.

2. GS&G's motion asserts good cause for its failure to timely file.

Even assuming that the majority is correct, and receipt was effective pursuant to section 105(a) on September 23, 2023, I would find that the operator alleged a good cause reason for its subsequent late filing.

The operator's motion asserts that it believed that the assessment became a final order on October 25, 2023, because of the circumstances surrounding the receipt of the assessment. Mot. at 2 (asserting that the notice of contest was submitted "within the allowable timeframe"). GS&G further contends that the date of delivery, September 23, 2023, was a Saturday, a day the mine does not operate. Furthermore, the post office branch closes at 12:00 p.m. on Saturdays.

² *Certified Mail – The Basics*, USPS (Aug. 2024), <https://faq.usps.com/s/article/Certified-Mail-The-Basics>.

Mot. at 1. Finally, GS&G asserts that the assessment was delivered without the “required [] signature of receipt.” Mot. at 2.

Additionally, the mine operator filed this motion to reopen only eight days after MSHA rejected its attempt to contest the penalties. The Commission has held that 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 that a movant’s good faith or lack thereof is an important factor in determining whether good cause exists to reopen a final order.”)

Accordingly, I would conclude that the operator has sufficiently asserted that the dates and method of delivery, including the lack of signature service, created confusion regarding the date the notice of contest was due and the resulting delay in timely filing was the result of a good cause reason. The Commission has routinely granted motions to reopen alleging similar mistakes. *See, e.g., Brand Industrial Services, LLC*, No. LAKE 2024-0155 (July 24, 2024) (“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.”).


Mary Lu Jordan, Chair

Distribution:

David M. Bryan, President
Georgetown Sand & Gravel Inc.
Box 127
Georgetown, PA 15043
Davidbryan@bryanmaterialsgroup.com

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.April@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Melanie Garris
USDOL/MSHA, OAASEI/CPCO
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov