

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 22, 2024

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2023-0250
v.	:	A.C. No. 14-01647-574329
	:	
MID-STATES MATERIALS, LLC	:	

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

ORDER

BY: Rajkovich, 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 August 8, 2023, the Commission received from Mid-States Materials, LLC (“Mid-States”) 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).

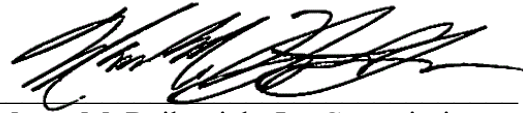
Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on April 17, 2023, and became a final order of the Commission on May 17, 2023. On June 16, 2023, MSHA received payment for civil penalties associated with three of the ten citations listed on the proposed assessment form (Citation Nos. 9728661, 9728663, and 9728667). On July 3, 2023, MSHA sent the operator a delinquency notice for the remaining seven penalties.

Mid-States that it paid the penalties associated with three of the citations (Citation Nos. 9728661, 9728663, and 9728667) and emailed its notice contesting the penalties associated with the remaining seven citations to an MSHA email address. Mid-States attached to its motion a copy of its email to MSHA, dated June 14, 2023, 28 days after the proposed penalties became a final order of the Commission. The Secretary opposes Mid-States’ motion on the basis that the operator has failed to provide a sufficient reason justifying relief.

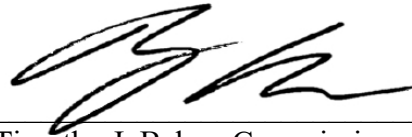
A party seeking to reopen a final penalty bears the burden of showing that it is entitled to such relief, through a detailed explanation of its failure to timely respond. *Revelation Energy, LLC*, 40 FMSHRC 375, 375-76 (Mar. 2018). General assertions or conclusory statements are insufficient. *Southwest Rock Prod., Inc.*, 45 FMSHRC 747, 748 (Aug. 30, 2023); *B & W Res., Inc.*, 32 FMSHRC 1627, 1628 (Nov. 2010). At a minimum, the applicant 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. *Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010). Here, Mid-States has provided no explanation for sending its contest of the seven penalties after they had become final. We find that the operator has failed to meet its burden of showing that it is entitled to relief.

Mid-States has also failed to explain the apparent delay in filing its motion to reopen. The Commission has 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). Conversely, however, motions to reopen filed more than 30 days after such notice “should include an explanation for why the operator waited so long to file for reopening,” and “[t]he lack of such an explanation is grounds for the Commission to deny the motion.” *Id.* Here, it appears that Mid-States filed its motion more than two months after the assessment became final, and more than one month after the Secretary’s delinquency notice. Mid-States offers no explanation for the delay.


Having reviewed Mid-States' request and the Secretary's response, we find that the operator has not provided a sufficient explanation to justify reopening the captioned proceeding. *See Pocahontas Coal Co.*, 46 FMSHRC 322, 323 (May 2024) (denying relief where operator offered insufficient reason for untimeliness in filing contest and was delayed in filing motion to reopen). Accordingly, we deny with prejudice Mid-States' motion.¹



Marco M. Rajkovich, Jr., Commissioner



Timothy J. Baker, Commissioner



Moshe Z. Marvit, Commissioner

¹ Our dissenting colleagues agree that Mid-States failed to establish good cause to reopen this proceeding. However, they note that the Secretary suggested that we dismiss this case “without prejudice” to allow the party to file a second motion to reopen. Such an approach would unnecessarily prolong this matter, while resulting in the same outcome. If Mid-State was allowed an opportunity to file a second motion to reopen, it would necessarily be denied. The Commission has consistently held that a second request to reopen filed after a denial without prejudice must be made “within a reasonable time” and that, pursuant to Rule 60(b), “a reasonable time” must be within one year of the final order. *See WKJ Contractor's Inc.*, 32 FMSHRC 45 (Jan. 2010); *Rogers Group, Inc.*, 39 FMSHRC 1551 (Aug. 2017). As noted above, the instant case became final on May 17, 2023. Therefore, any motion to reopen filed after this order would necessarily be more than one year after that date. As a result, ordering a dismissal without prejudice is functionally identical to dismissal with prejudice.

Chair Jordan and Commissioner Althen dissenting,

We dissent from our colleagues' decision to deny Mid-States Material's motion to reopen the captioned proceeding *with prejudice*.

Mid-States Materials filed a short request with the Commission, seeking our reopening of a final order. The operator's *pro se* motion failed to conform with Commission guidance, lacking any explanation regarding their original failure to timely file to contest the Secretary's proposed civil penalty assessment. *See Filing a Request to Reopen a Final Commission Order*, www.fmsshrc.gov/content/requests-reopen (last visit August 1, 2024).

While the Secretary opposed the operator's motion, the Secretary recommended that the Commission deny the motion *without prejudice*, which would have provided the operator with an opportunity to re-file and identify whether there was a good cause reason for their failure to timely contest the assessment. Instead, the Commission has denied the motion with prejudice, foreclosing an opportunity for the operator to rectify deficiencies in its motion.

Consistent with the Secretary's proposed resolution, we believe the Commission should have instead issued an Order to Show Cause, directing the operator to provide a reason for their failure to timely contest, with supporting documentation within 30 days. *See, e.g., R.E. Pierson Materials Corp.*, 45 FMSHRC 757 (Aug. 2023) (in which the Commission issued an Order to Show Cause providing the operator the opportunity to remedy a deficient motion to reopen and demonstrate good cause for its failure to timely contest the proposed penalty).

Accordingly, we dissent.



Mary Lu Jordan, Chair



William I. Althen, Commissioner

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