

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 29, 2022

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2021-0168
v.	:	A.C. No. 41-04914-515484
ESPINOZA STONE, INC.	:	
	:	

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY: Althen and Rajkovich, 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 June 21, 2021, the Commission received from Espinoza Stone, Inc. (“Espinoza”) 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).

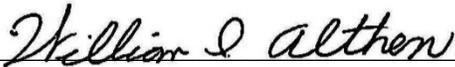
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of 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 June 12, 2020, and became a

final order of the Commission on July 13, 2020. Espinoza asserts that its failure to timely contest the proposed assessments was the result of the unprecedented strain caused by the Covid 19 pandemic. The operator contends it did not discover its failure to contest until June 1, 2021, and that it has put processes in place that allow the Company to handle the administrative tasks required. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Espinoza's request and the Secretary's response, we find that the operator's failure to timely contest the proposed penalties was excusable neglect, resulting from the unprecedented strain of the Covid 19 pandemic. After discovering its mistake, Espinoza filed a motion to reopen 20 days later. In the interest of justice, we hereby reopen this matter and remand it 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.



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner

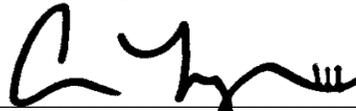
Chair Traynor, dissenting:

I dissent from my colleagues' decision that Espinoza Stone demonstrated its failure to timely contest the proposed penalties was the result of excusable neglect resulting from the strain of the Covid-19 pandemic. The operator's filing does not support this conclusion. It provides no specific details concerning the facts and circumstances of its failure to timely contest. There is no declaration from a responsible party. There is nothing more than an unsupported assertion that its failure to timely contest was caused by the pandemic.

Espinoza Stone routinely defaults on penalties. Proposed Assessment No. 000515484 states that the operator had unpaid balances in separate cases (000506852 dated 01/02/2020 and 000496409 dated 07/31/2019). Each of these prior assessments were issued months before the widespread disruptions caused by the pandemic. The prior defaults undermine the assertion that the current default was the result of a single lapse. Accordingly, the operator has not satisfied its burden to demonstrate that its failure to contest the subject assessment was the result of excusable neglect.¹

In addition, the motion to reopen was filed just shy of the one-year limitation period we apply to such motions.² Espinoza Stone does not explain why 343 days passed before it filed the instant motion to reopen. Its motion merely states that it discovered its failure to contest the proposed penalties 20 days prior to filing its motion. The motion neither provides an explanation of how the lapse was discovered, nor addresses the operator's conduct in the intervening period between final order and discovery of the problem. In particular, the operator does not address the separate notice of delinquency issued by the Mine Safety and Health Administration on August 27, 2020.

For these reasons, I find that Espinoza Stone has not demonstrated that its failure to timely file was the result of excusable neglect in this case. *See E & G Masonry Stone No. 2*, 36 FMSHRC 5 (Jan. 2014) ("Due to the extraordinary nature of reopening a penalty that has become final, the operator has the burden of showing that it should be granted such relief through a detailed explanation of its failure to timely contest the penalty and any delays in filing for reopening.").



Arthur R. Traynor, II, Chair

¹ It is well established that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008).

² Pursuant to Rule 60(c)(1) of the Federal Rules of Civil Procedure, a motion under Rule 60(b) "must be made within a reasonable time - and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding."

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