January 2024

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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 19, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of JIMMY LEE HOOVER v. MOSENECA MANUFACTURER LIMITED LIABILITY COMPANY d/b/a/ AMERICAN TRIPOLI	Docket No. CENT 2024-0024

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

DECISION

BY THE COMMISSION:

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On November 16, 2023, the Secretary of Labor filed an Application for Temporary Reinstatement on behalf of Jimmy Lee Hoover ("Hoover") against MoSeneca Manufacturer Limited Liability Company d/b/a/ American Tripoli ("MoSeneca") pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).

On December 13, 2023, the Administrative Law Judge issued an Order Granting Temporary Reinstatement of Hoover. 45 FMSHRC __ (Docket No. CENT 2024-0024)(Dec. 13, 2023) (ALJ). On December 15, MoSeneca filed a Petition seeking review of the Judge's order.[1] On December 21, the Judge issued an addendum to his December 13 Order. Subsequently, on December 22, the Commission issued an order stating that any response by the Secretary to the operator's petition for review shall be filed by January 9, 2024. On January 9, the Secretary filed her response. For the reasons that follow, we hereby affirm the Judge's Order Granting Temporary Reinstatement.

[1] MoSeneca filed what it termed a petition for discretionary review, which the Commission construed as a petition seeking review of the Judge's reinstatement order pursuant to 29 C.F.R. § 2700.45.

I.

Factual and Procedural Background

This case involves a mill located at a mine in Newton, Missouri. The current owner, Russell Tidaback, has employed the miner, Jimmy Lee Hoover, at the mill since June 2021. While trying to start the mill on September 13, 2023, Hoover noticed that an airlock was not running properly because of a malfunctioning circuit breaker. Tr. 29. Hoover tried, but failed, to reset the circuit breaker using an external reset button on the outside of a breaker box. Sec. Ex. 3 at 2. Hoover testified that he did not attempt to manually reset the circuit breaker because this would have required him to remove the cover of the breaker box, insert his hand into the box, and switch on the internal manual reset. The manual reset would expose his hand to an energized 220 volt current. In the past, when the circuit breaker needed to be reset manually, Hoover had called maintenance staff for their assistance, but there was no maintenance staff present at that time. Sec. Ex. 3 at 3.

Hoover reported the malfunctioning circuit breaker to Don Hale, his immediate supervisor, and together with Hale, reported it to Operations Manager John Spears. Sec. Ex. 3 at 3. Hoover alleged that when he reported the malfunction to Spears, Spears responded that "we got to make Russ[ell Tidaback] money." Tr. at 33. Hoover testified that he interpreted this statement as an instruction to do whatever was necessary to reset the circuit breaker, including an internal manual reset. Tr. 59. However, Hoover refused to perform the manual reset because of his fear that he might be electrocuted if he inserted his hand into the energized breaker box. Tr. 92. Hoover alleges Spears responded to Hoover's work refusal by saying "is this how you're going to play it, really?" Tr. at 121.

After this conversation with Spears, Hoover took his lunch break. Tr. 33. It is undisputed that Hoover was late in returning from his lunch break. Tr. 16, 228. Hale claims that when he informed Hoover of this delay, Hoover disrespectfully responded "I don't care, go ahead and write me up." Tr. 219. At around 8 p.m. that evening, Hale informed Russell Tidaback of Hoover's delay in returning from lunch and Hoover's alleged disrespectful response when Hale informed him of his late return. Resp't Ex. H. Subsequently, Tidaback drafted a letter terminating Hoover. The following morning, when Hoover arrived at the mine to start his workday, Spears issued the termination letter to Hoover. Sec's Ex. 2; Sec's Ex. 3 at 3.

On September 25, 2023, Hoover filed a complaint with MSHA over his termination. Michael Dillingham, an MSHA investigator, investigated Hoover's discrimination complaint, and concluded it had not been frivolously brought. Subsequently, on November 16, 2023, the Secretary filed an application for temporary reinstatement of Hoover. After a hearing in this matter, the Judge found that the Secretary had "demonstrated that the Application for Temporary Reinstatement was not frivolously brought." ALJ Dec. at 7.

The Judge found that Hoover engaged in protected activity on September 13, 2023, when he refused to perform a manual internal reset of the malfunctioning circuit breaker. The Judge used circumstantial indicia of discriminatory intent to find that there was a non-frivolous issue as to a motivational nexus between Hoover's protected work refusal and his termination. *Id.* at 7-9.

The Judge noted that the operator was "permitted to present evidence and testimony throughout the hearing in support of [its] position" that Hoover was terminated solely for unprotected activity. *Id*. at 8. However, the Judge found that while evidence of Hoover's unprotected activity "may be relevant or dispositive in a later discrimination proceeding," for purposes of temporary reinstatement, such evidence simply provided an alternative theory as to why Hoover was terminated and was insufficient to demonstrate "that the Complainant brought forth a frivolous complaint." *Id* at 8.

On December 15, 2023, the operator filed a petition seeking review of the Judge's order. The operator claims that the Judge erroneously found protected activity because the "ALJ's conclusion is based more on subjective interpretation than on objective factual evidence." Pet. at 2. Moreover, the operator maintains that the protected activity played no role in Hoover's termination, asserting that "this is not a case in which the complainant was . . . terminated due to . . . [a] protected act; rather, the termination was due to . . . legitimate non-discriminatory reasons." *Id.* at 4.

II.

Disposition

Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the Judge as to whether a miner's discrimination complaint is frivolously brought." *See Sec'y obo Price v. Jim Walter Res., Inc*., 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990); *Sec'y obo Jones v. Kingston Mining, Inc.*, 37 FMSHRC 2519, 2522 (Nov. 2015). The Commission reviews a Judge's temporary reinstatement order under the substantial evidence standard. *Sec'y obo Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). As the Commission has recognized, "[i]t [is] not the Judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings." *Sec'y obo Albu v. Chicopee Coal C*o., 21 FMSHRC 717, 719 (July 1999).

"While an applicant for temporary reinstatement need not prove a prima facie case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity." *Sec'y obo Williamson,* 31 FMSHRC at 1088.

Discriminatory motive may be shown by indirect evidence establishing a motivational nexus between the miner's protected activity and the adverse action. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981) (citing *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)). The Commission has held that discriminatory motive can be established by circumstantial evidence of: (1) knowledge of the

protected activity, (2) hostility or animus towards the miner regarding the protected activity, (3) temporal proximity, *i.e.* coincidence in time between the protected activity and the adverse action, and (4) disparate treatment of the complainant. *Id.* at 2510-12.

In his decision, the Judge found that the miner had engaged in protected activity by allegedly refusing unsafe work. ALJ Dec. at 7. Hoover testified he was aware of a miner receiving an electrical shock after touching an Allen wrench located in a breaker box which was supposed to have been de-energized. Tr. 91-92 ("Don grabbed a Allen wrench that was in a breaker box and said it was shut off and he grabbed that and it lit him up. And it was supposed to be dead. That was in my head, too, while I was looking at this breaker box."). Additionally, Hoover's testimony that Spears told him "we got to make Russ [Tidaback] money" (Tr. 33), while contested, could reasonably be construed as an instruction to Hoover.

The operator did not dispute that Hoover had a good faith reasonable belief that performing a manual internal reset of the circuit breaker would expose him to a perceived hazard. We note that the Commission has recognized a miner's protected right to refuse work in the face of a perceived safety or health danger. *Dykhoff v. U.S. Borax,* 22 FMSHRC 1194, 1198 (Oct. 2000) (citing *Price v. Monterey Coal Co.,* 12 FMSHRC 1505, 1514 (Aug. 1990)). In order to be protected, "work refusals must be based upon the miner's good faith, reasonable belief in a hazardous condition." *Dykhoff,* 22 FMSHRC at 1198. As a result, the Judge appropriately determined that Hoover's alleged refusal to perform an alleged unsafe act – a manual internal reset of the circuit breaker – raised a non-frivolous claim that he engaged in protected activity. Therefore, we find that substantial evidence demonstrates a non-frivolous claim that Hoover, by refusing to perform the unsafe act, engaged in protected activity.

In its petition seeking review of the Judge's order, the operator claims that the Judge's determination that the miner engaged in protected activity was not based on any direct orders or explicit actions, but on circumstantial evidence. In support of this position, Respondent cited evidence that it submitted at hearing that no member of Respondent's management ordered Hoover to place his hand inside the energized breaker box. However, the ALJ addressed this evidence, noting the existence of countervailing "circumstantial evidence that it is management's expectation that a miner do whatever is necessary, when maintenance is not available, to get the mill up and running." ALJ Dec. at 7. The Judge noted this conflict in the testimony, but appropriately did not resolve the conflict or make credibility determinations. *Id*. at 8 *(citing Sec'y of Labor obo Williamson*, 31 FMSHRC at 1089) (Resolving conflicts in the testimony, and making credibility determinations in evaluating the Secretary's prima facie case are simply not appropriate "at this stage in the proceeding."). Conflicts in the evidence should be resolved at the hearing on the merits.

In addition to finding protected activity, the Judge also found that it is undisputed that the miner suffered an adverse employment action, in that he was discharged. ALJ Dec. at 7. Substantial evidence supports this finding as well.

The Judge determined that the Secretary had raised a non-frivolous issue as to whether there was a motivational connection between the protected activity and the adverse employment action. The Judge found that it was undisputed that the miner suffered an adverse employment

action the day after he alleged to have engaged in protected activity. ALJ Dec. at 7. Finally, the Judge determined that Secretary raised non-frivolous issues as to whether Respondent had knowledge of Hoover's alleged protected activity and whether Respondent displayed animus towards that alleged protected activity. *Id*. at 7-8. On appeal, the operator does not challenge the Judge's findings regarding temporal proximity and knowledge. Pet. at 1-5. The Judge's undisputed findings "can be sufficient by themselves to establish a nexus between the protected activity and the adverse action." *Sec'y obo Roger Cook v. Rockwell Mining, LLC,* 43 FMSHRC 157, 163 (Apr. 2021) (*citing Sec'y of Labor on behalf of Stahl v. A&K Earth Movers Inc*., 22 FMSHRC 323, 325-26 (Mar. 2000)).

In response to the Secretary's presentation regarding discrimination, Respondent asserted that it had terminated Hoover solely for unprotected activity – misconduct and poor performance. Pet. at 2. However, the Judge appropriately declined to rule on the operator's theory that Hoover was terminated solely for his unprotected activity. As noted previously, the Judge's role during temporary reinstatement proceedings is to simply determine whether substantial evidence established that the discrimination complaint was nonfrivolous. *Jim Walter,* 920 F.2d at 744. In this case, ruling on the operator's theory would have required the Judge to go beyond the nonfrivolous standard to impermissibly weigh evidence and/or render credibility determinations. *CAM Mining, LLC*, 31 FMSHRC at 1089. Therefore, the Judge appropriately declined to consider Respondent's argument at the temporary reinstatement stage.

III.

Conclusion

Substantial evidence supports the Judge's finding that the Secretary demonstrated that the Application for Temporary Reinstatement was not frivolously brought. Therefore, the Judge's order granting temporary reinstatement is affirmed.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 4, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. PANTHER CREEK MINING, LLC	Docket No. WEVA 2023-0297 A.C. No. 46-05437-569447

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

ORDER

BY: Jordan, Chair; Rajkovich, and Baker, Commissioners

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On April 25, 2023, the Commission received from Panther Creek Mining, LLC ("Panther Creek") a motion to reopen a final order of the Commission pursuant to section 105(a) of the 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 operator on January 17, 2023, and became a final order of the Commission on February 16, 2023, after Panther Creek did not contest the penalties. In the assessment, MSHA had proposed a total civil penalty of $75,601 for the 49 citations at issue.

On April 3, 2023, after failing to receive payment, the Secretary sent the operator a delinquency notice. On approximately April 17, 2023, MSHA delivered a scofflaw letter to the mine, which stated that if the operator did not pay the delinquent penalties within 30 days MSHA may take further action. The operator filed the subject motion to reopen on April 25, 2023. On May 17, 2023, MSHA issued a citation to Panther Creek alleging a failure to pay.

In the subject motion to reopen, Panther Creek maintains, without further explanation, that an internal "administrative error" delayed routing of the assessment to its Corporate Safety Director and thus its ability to timely file. The Secretary opposes reopening. She asserts that the operator has failed to establish that its failure to timely file was the result of an atypical mistake and not the result of an inadequate processing system. Furthermore, the operator has failed to establish that it has been acting in good faith.

When filing a motion to reopen before the Commission the operator bears the burden of showing exceptional circumstances. *Lone Mountain Processing, Inc*., 35 FMSHRC 3342, 3345 (Nov. 2013). Relief under Rule 60(b) requires more than "general assertions or conclusory statements as to why an operator failed to timely contest." *Sw. Rock Prods.*, 45 FMSHRC __ (August 30, 2023) (*citing Atlanta Sand & Supply Co*., 30 FMSHRC 605, 608 (July 2008).

Although the Commission may consider motions to reopen filed within 30 days of the operator's receipt of its first notice of delinquency to be filed within a reasonable amount of time; the motion must also "set forth an adequate explanation for its reasons for its delinquency." *See Highland Mining Company*, 31 FMSHRC 1313, 1316-17 (Nov. 2009). "At a minimum, the applicant for such relief 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 and for any delays in seeking relief once the operator became aware of the delinquency or failure. . . ." *Lone Mountain,* 35 FMSHRC at 3345 (*citing Higgins Stone Co*., 32 FMSHRC 33, 34 (Jan. 2010)).

Panther Creek's motion lacks these required details. Its motion does not include relevant dates or a description of the processing error.[1] Accordingly, it has failed to demonstrate that its "administrative error" was excusable and not the foreseeable result of its own unreliable internal processing system. It is well established that an inadequate or unreliable internal processing system does not constitute inadvertence, mistake or excusable neglect so as to justify the reopening of an assessment which has become final under section 105(c) of the Mine Act. *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co*., 31 FMSHRC 1313, 1315 (Nov. 2009): *Double*

[1] *Cf. Heidelberg Materials, US Cement, LLC*, 45 FMSHRC ___ (Dec. 6, 2023) (finding that the operator established that its failure to timely file to contest three citations was the result of a good cause). In *Heidelberg Materials*, the operator's motion described the error with particularity, *i.e*., an employee neglected to transmit a single page of the contest form when timely filing to contest penalties listed on the proposed assessment.

Bonus Coal Co., 32 FMSHRC 1155, 1156 (Sept. 2010); *Elk Run Coal Co*., 32 FMSHRC 1587, 1588 (Dec. 2010).[2]

Furthermore, Panther Creek has not demonstrated good faith efforts to comply with the Commission's filing deadlines. The operator received 49 citations over 18 days and thus should have been aware that it would be receiving a sizable proposed penalty assessment. Nevertheless, it does not cite to any efforts it took to either contest or reopen the penalties until after it received both a delinquency letter and a scofflaw letter. 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. *See, e.g., Stone Zone*, 41 FMSHRC 272, 274 (June 2019) (citations omitted).

For these reasons, Panther Creek's motion is DENIED with prejudice.[3]

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

[2] This is not the first instance where Panther Creek sought reopening of a final order of the Commission after an alleged error prevented timely filing of the contest form. *See Panther Creek Mining, LLC*, 40 FMSHRC 1158 (Aug. 2018) (reopening a final order after the assessment was not timely contested because the assessment was "mishandled" at the mine). Notably, the operator thereafter changed its address of record from a P.O. Box to the corporate office in an attempt to prevent further mishandlings of penalty assessments. *Id*. at 1159. Clearly, the operator's efforts were ineffective.

[3] In its reply to the Secretary's response, the operator contends that the Secretary failed to demonstrate prejudice or that the default was warranted. However, we have long held that it is the operator, not the Secretary, who has the burden of showing that it is entitled to such extraordinary relief. *See, e.g., Noranda Alumina*, 39 FMSHRC 441, 443 (Mar. 2017).

Commissioner Althen dissenting,

I respectfully dissent.

The pleadings demonstrate that MSHA provided a notice of a delinquency to Panther Creek through a letter mailed on April 3, 2023. In turn, Panther Creek filed its motion to reopen on April 25, 2023—a short period after receiving the notice from MSHA.

Binding Commission precedent holds, "Motions 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). Indeed, the Commission reaffirmed, or at least restated, this principle a few days ago. *Heidelberg Materials, US Cement, LLC*, 45 FMSHRC ___ (Dec. 6, 2023).

Because Panther Creek's motion fits within this timeline, the majority cannot find unreasonableness in the delay in filing. Ignoring the reasonableness of the operator's timing of its motion, the majority complains that the employee's affidavit swearing to an administrative error was insufficient to warrant reopening or even an opportunity for further explanation.

Panther Creek's contest system failed in this instance, but there is no evidence of a systematic failure. Instead, Panther Creek described a straightforward and simple system for contesting penalties. According to Panther Creek's affidavit, the system involves an administrative employee scanning proposed assessments when they are received and then directing them to the corporate safety director. The corporate safety director then reviews the citations and files timely notices on those Panther Creek wishes to contest. This appears to be a sensible two-step and an ordinarily reliable system for dealing with citations. If every singular failure to file on a timely basis is taken as a *per se* demonstration of an unreliable processing system, operators may look forward to few, if any, approvals of reopening.

The occurrence of a mistake is self-evident. The administrative staff tasked with scanning and forwarding the proposed assessment failed to follow normal procedure in this instance. Panther Creek filed a proper affidavit attesting to the error. Nonetheless, the majority forecloses a contest of more than $75,000 in assessed penalties because they find Panther Creek did not explain adequately the exact minutiae that lead to the administrative error. The Commission has not required a detailed explanation of an "administrative error" to reopen a case. *U.S. Silver – Idaho, Inc.*, 33 FMSHRC 1044, 1045 (May 2011).

Having avowed they recognize that default is a harsh remedy, the majority should have granted the motion or, minimally, should have provided Panther Creek an opportunity to provide any desired information. Such inquiries have been made in the past and are consistent with recognition of harsh result rather than the back of the hand rejection in this case. *See, e.g., Callender Constr. Co*., 44 FMSHRC 536 (Aug. 3, 2022), *Lafarge Aggregates Southeast, Inc.,* 31

FMSHRC 555 (May 2009) (granting the motion to reopen after the Commission initially denied without prejudice to allow the operator to refile and explain the "administrative error").

/s/ William I. Althen
William I. Althen, Commissioner

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January 8, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. MORTON SALT, INC.	Docket No. CENT 2023-0218 A.C. No. 16-00970-574494

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

ORDER

BY THE COMMISSION:

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 23, 2023,[1] the Commission received from Morton Salt, Inc. ("Morton"), 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 11, 2023. On May 11, 2023, MSHA received partial payment in the amount of $3,030.00 for 12 of the 16 citations

[1] On July 19, 2023, Morton filed an Amended Motion to Reopen correcting a referenced citation number from 9673919 to 9674919.

listed on the proposed assessment. On May 17, 2023, the assessment became a final order of the Commission with respect to the penalties of the remaining four citations. On July 3, 2023, MSHA sent the operator a delinquency notice.

Morton states that on April 26, 2023, it checked the boxes on the proposed assessment to indicate that it was contesting Citation Nos. 9676699, 9674919, 9674924, and 9674925. The operator maintains that it had also sent a conference request on March 3, 2023, for Citation Nos. 9674924 and 9674925 but received no response. Morton submits that although its EHS Manager timely completed the contest form, he inadvertently failed to mail or email the form. It contends that it will make the required change to its process to be sure that this error does not occur again. The operator requests that the Commission reopen the penalty assessment to permit Morton to contest the four citations.

The Secretary opposes the operator's motion to reopen. The Secretary argues that Morton has failed to timely contest proposed assessments in the past, and that the repeated failures indicate that the operator has an unreliable system for processing assessments. The Secretary further disputes that MSHA failed to respond to its conference request. She also notes that the operator has reason to pay particular attention to its citations and penalties because the operator's mine has been notified that it has a pattern of violations and two of the citations (Nos. 9674924 and 9674925) were designated as significant and substantial in nature.[2]

Consistent with the Secretary's submission, the Commission has previously reopened penalty assessments issued to Morton that became final due to the operator's inadvertence or mistake in processing its proposed assessments. *Morton Salt, Inc.*, 44 FMSHRC 533 (Aug. 2022); *Morton Salt, Inc.*, 45 FMSHRC ___, No. CENT 2022-0237 (May 16, 2023). The Commission has recognized that repeated motions to reopen may indicate an inadequate or unreliable internal processing system. *Rockwell Mining, LLC*, 45 FMSHRC ___, Nos. WEVA 2022-0467, et al. (June 29, 2023). Although Morton has stated that it will take action to prevent such a reoccurrence in the future, it has not identified the steps it will take.

In addition, it appears that MSHA responded to the operator's request for a conference and provided information about contest procedures. An attachment to the Secretary's opposition reveals that on April 18, 2023, the operator sent MSHA an email acknowledging that it had received the proposed assessment on April 11, 2023, that it had 30 days to contest the citations on the assessment, and that the operator had requested a conference on Citation No. 9674919 on March 8, 2023, and on Citation Nos. 9674924, and 9674925 on March 16. MSHA responded by email dated April 25, 2023, that those citations had been assessed and were not eligible for a conference, and that if the operator wished to contest the citations, it would "need to select the citation on the assessment form and return the contested assessment form to the assessment office." Attach. D.

[2] Section 104(e)(1) of the Mine Act provides that if an operator has a pattern of violations of mandatory health or safety standards which are of such nature as could significantly and substantially contribute to the cause and effect of health or safety hazards, it shall be given written notice that such a pattern exists. If, within 90 days following issuance of the POV notice, an inspector cites the operator for a significant and substantial violation, then MSHA may issue a withdrawal order under section 104(e) of the Act. 30 U.S.C. § 814(e)(1).

The Commission has made it clear 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).

We find that Morton has not asserted good cause for its failure to timely contest the proposed penalties. *See Marfork Coal Co.*, 45 FMSHRC ___, No. WEVA 2023-0043 (June 23, 2023) (denying a motion to reopen when the operator neglected to fix problems with its internal procedures). The motion is DENIED WITH PREJUDICE.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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January 9, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. PEABODY GATEWAY NORTH MINING, LLC	Docket No. LAKE 2022-0220 A.C. No. 11-03235-556483

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On February 10, 2023, the Commission received from Peabody Gateway North Mining, LLC ("Peabody Gateway") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On November 9, 2022, the Chief Administrative Law Judge issued an Order to Show Cause in response to Peabody Gateway's perceived failure to answer the Secretary of Labor's September 8, 2022 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on December 9, 2022, when it appeared that the operator had not filed an answer within 30 days.

Peabody Gateway asserts that its part-time contractual Safety Manager acted with excusable neglect in failing to submit a timely answer to the Petition here, primarily because he was distracted and preoccupied by the fact that his "elderly father was injured and hospitalized" during the relevant period. Peabody Decl. Ex. A. According to the operator, the part-time Safety Manager processes assessments along with the mine's site safety manager. The part-time Safety Manager received the Petition for Assessment of Civil Penalty but was on travel for an audit. Due to being distracted from his father's medical situation, upon returning the Safety Manager inadvertently misread the Petition as an Entry of Appearance from the Secretary's Trial Attorney who issued the Petition. Furthermore, when he received the Commission's Order to Show Cause and Order of Default, he asserts he inadvertently misread it because it contained the term "COVID-19" in the subject line. According to the Safety Manager, he "receive[s] many emails with 'COVID-19' in the subject line which are informational and do not require a response and . . . [he thus] mistakenly believed this email to be irrelevant." *Id*. Peabody Gateway asserts that the Safety Manager's misreading of the Petition and Order to Show Cause was contributed to by his family's medical incident, which took some of his "attention away from work" and prolonged the time it took him to realize that he had missed these documents to file a timely Answer to the Petition. *Id*. The operator's counsel filed the motion to reopen after learning of these errors. The

Secretary does not oppose the request to reopen, but notes that he may oppose future requests to reopen penalty assessments that are not answered in a timely manner.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). 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 will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Peabody Gateway's request and the Secretary's response, we find that the operator acted with excusable neglect, particularly in light of his family member's medical situation. The operator, however, should reassess its procedures to ensure that future answers are properly filed. In the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded 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.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
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/s/ Timothy J. Baker
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January 9, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. UNITED TACONITE, LLC,	Docket No. LAKE 2023-0205 A.C. No. 21-03404-570153

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

ORDER

BY: Jordan, Chair; Rajkovich and Baker, 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 23, 2023, the Commission received from United Taconite, LLC ("United"), 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 operator on January 24, 2023. On February 23, 2023, the assessment became a final order of the Commission.

United Taconite argues that staffing changes caused its failure to timely file a contest of twenty civil penalties listed on the proposed assessment. It explains that its Senior Safety

Specialist, who makes the decisions about which citations and penalties to contest, was working in another department at the time of the issuance of the proposed assessment. In addition, the operator's safety manager, who managed the proposed assessment forms, was permanently transferred to another department on February 16, 2023, and a new health and safety specialist was hired on January 20, 2023. United Taconite states that when its safety manager departed on February 16, he handed mail, which included the proposed assessment, to the new safety specialist without providing any instructions. No action was taken on the proposed assessment. After the Senior Safety Specialist returned to the safety department, he received a delinquency notice and contacted outside counsel.[1] On April 24, 2023, he trained the newly hired safety specialist on procedures for handling MSHA assessments. United Taconite explains that any further delay after receiving the delinquency notice was the result of counsel's investigation, preparation of the motion to reopen, and counsel's litigation schedule. Mot. at 6.

The Secretary opposes the operator's motion to reopen. The Secretary states that on March 15, 2023, MSHA received partial payment for three citations. On April 10, 2023, MSHA sent United Taconite a delinquency notice. On May 1, 2023, MSHA received another partial payment for 9 of the 59 citations. On June 2, 2023, MSHA issued United Taconite a demand letter stating that the operator must pay a total of $70,737 within 30 days or MSHA would take additional enforcement action. On July 14, 2023, MSHA issued a citation alleging that United Taconite had violated the Mine Act through its failure to pay.

In opposing United Taconite's motion, the Secretary argues that the operator's explanation that no action had been taken on the proposed assessment because there were personnel changes and that the newly hired safety specialist did not know the payment or contest process "boils down to inadequate procedures for responding to proposed penalties." Sec'y Response at 7. The Secretary asserts that the operator should have been more careful with the filing of the contests in this case given the large penalties proposed. She submits that although the new safety specialist was later trained, it did not address the inadequate procedures in this case. The Secretary contends that United Taconite filed its motion to reopen over 2 months after MSHA sent it a delinquency letter.

The Commission has made it clear 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*

[1] We note that our dissenting colleague states that when the Senior Safety Specialist received the notice of delinquency, he immediately returned the penalty assessment noting 20 citations the operator wished to contest. Slip op. at 4. Although the proposed penalty assessment form is signed and dated April 20, 2023, there are no allegations in the record that the operator returned the contest form to MSHA on or near that date. Rather, the contest form appears in the record as an attachment to the operator's June 23 motion to reopen. *See, e.g.,* Ex. C 001 (affidavit of senior safety specialist stating that once he became aware of the delinquency notice, he contacted the outside counsel's paralegal who informed him that it would be necessary to file a motion to reopen).

Mining Co., 30 FMSHRC 1061, 1062 (Dec. 2008). United Taconite did not provide the employee with training on proposed assessments, or otherwise remedy the confusion resulting from the staffing changes, for over two months. This amounts to an inadequate or unreliable internal processing system.

In addition, United Taconite failed to file the motion to reopen within a reasonable time. 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). The operator's June 23 motion to reopen was filed months after it received the April 11 delinquency letter and weeks after MSHA sent the operator a demand letter.

We find that United Taconite has not asserted good cause for its failure to timely contest the proposed penalties. *See Moose Lake Aggregates, LLC*, 34 FMSHRC 1, 2-3 (Jan. 2012) (denying a motion to reopen when the operator had deficient internal procedures and failed to file motion within a reasonable time). The motion is denied with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Commissioner Althen, dissenting:

I respectfully dissent.

This motion to reopen involves an attempt by United Taconite to challenge 20 citations totaling nearly $70,000 in proposed penalties.

The facts are not contested. A United Taconite Safety Specialist oversaw dealing with assessments. When he temporarily left his department in June 2022, a safety manager took over processing citations. However, that safety manager left that position virtually simultaneously with the receipt of the subject assessments. A new person replaced him but did not know the contents of the envelopes left behind.

In March, the Safety Specialist who had been on temporary reassignment returned and went over outstanding issues with the new Safety Specialist who had been unaware of the citations. At that point, the assessments were discovered.

When the Senior Safety Specialist found the notice of delinquency, he immediately returned the penalty assessment noting 20 challenged citations demonstrating its desire to contest those citations. United Taconite also responsibly turned the filing of a formal motion over to outside counsel. A paralegal for outside counsel affirmed via affidavit that United Taconite contacted her on April 21, 2023, regarding the delinquency notice that had been mailed by the Secretary on April 10, 2023. Writing with great integrity, the law firm acknowledges in the motion it filed that:

> Any further delay beyond the initial discovery of the delinquent Assessment [mid-April] upon receipt of the delinquency notice make April 3, was the result of counsel for United Taconite's investigation of this matter, preparation of the Motion to Reopen and related documents, and counsel's additional litigation schedule.

Mot. to Reopen at 6 (June 8, 2023).

United Taconite proved that it recognized its error and acted to correct it virtually immediately upon receiving first notice of delinquency. Within the last few days, the Commission reaffirmed a long-established position regarding timely recognition of an error.

> The Commission has held that quick action after recognizing an error militates in favor of reopening. "Motions to reopen received within 30 days of an operator's 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).

Undoubtedly, United Taconite's immediate action upon receipt of receiving notice of the error compels a finding of good faith. If the operator had typed a note asking to reopen with the submission, it unquestionably would be presumptively considered to have filed its motion within a reasonable time. Ignoring the operator's quick action, the majority uses a technicality that United Taconite did not file a "motion" to reopen but instead, acting reasonably, turned to its outside counsel.

The majority finds a reason to find a default of 20 citations comprising a very large penalty amount because United Taconite turned to its attorneys and the attorneys took two months to file the formal motion. The Secretary does not assert any prejudice because of the delay in filing a formal motion challenging the citations that the operator quickly contested upon receiving a notice of delinquency. *Cf. Long Branch Energy*, 34 FMSHRC 1984, 1991 (showing leniency to the Solicitor for failing to file timely during a period of increased litigation when actual prejudice could not be shown). Under these circumstances, United Taconite provided timely notice of its desire to challenge and an explanation of reasons for its failure to file within 30 days of receipt of the citations.

Apparently recognizing that United Taconite acted with promptness to notify MSHA and the Commission of its desire to contest citations, the majority also finds that United Taconite had an unreliable internal processing system. That allegation is false.

These facts do not show an unreliable system. They show a sui generis situation in which turnover of staff simultaneously with the temporary absence of a Safety Specialist led to a brief delay in recognizing and dealing with the assessments. With the Safety Specialist's return and within 30 days of first notice, United Taconite served notice of its desire to contest the 20 citations. In short, a reliable internal system was temporarily disrupted by the simultaneous absence of the prior safety manager and the temporarily reassigned Safety Specialist.

This case does not reflect poor internal processing or lack of expedition by United Taconite. It is a singular event caused by staff turnover. Yet, the majority reviews United Taconite's quick action and finds no difficulty in refusing it the opportunity to contest penalties totaling a very high amount.

The majority's opening paragraph purports to recognize that default is a harsh remedy. Institutions are known for the actions they take not the high-sounding words they write. The majority's decision belies their words.

/s/ William I. Althen
William I. Althen, Commissioner

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January 9, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. ALLYNDALE CORPORATION	Docket No. YORK 2022-0075 A.C. No. 06-00001-560427

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

Having reviewed movant's unopposed motion to reopen, we 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. 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.

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chai

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

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January 25, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. COAL-MAC LLC	Docket No. WEVA 2023-0154 A.C. No. 46-08249-569568 Docket No. WEVA 2023-0155 A.C. No. 46-08984-569574 Docket No. WEVA 2023-0156 A.C. No. 46-09075-569575 Docket No. WEVA 2023-0192 A.C. No. 46-08918-571114 Docket No. WEVA 2023-0196 A.C. No. 46-08249-571110

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On August 24, 2023, the Commission received from Coal-Mac, LLC ("Coal-Mac") a motion seeking to reopen five penalty assessment proceedings and relieve it from the Default Orders entered against it.[1]

In each of the captioned proceedings, the Chief Administrative Law Judge issued an Order to Show Cause in response to Coal-Mac's perceived failure to answer the Secretary of Labor's Petition for Assessment of Civil Penalty. The Secretary filed the relevant petitions on March 16 (Docket Nos. WEVA 2023-0154, WEVA 2023-0155, WEVA 2023-0156), March 30 (WEVA 2023-0192) and April 4, 2023 (WEVA 2023-0196). The Chief Judge issued Orders to Show Cause on May 16, May 30 and June 5, 2023, respectively, which were deemed Default Orders on June 16, June 30 and July 6, 2023, when it appeared that the operator had not filed an answer within 30 days.

Coal-Mac asserts, without further detail, that the captioned proceedings are in default because its Safety Manager was unfamiliar with the contest process and made mistakes. The Secretary opposes the request to reopen. The Secretary argues that the claim of "error" is insufficiently detailed to justify reopening, and that the Safety Manager's lack of familiarity with

[1] For the limited purpose of addressing these motions to reopen, we hereby grant the Secretary's motion to consolidate the captioned docket numbers involving similar procedural issues. 29 C.F.R. §2700.12.

the contest process indicates inadequate internal procedures. The Secretary also claims the proceedings are moot because the relevant penalties have all since been paid. Finally, the Secretary argues that the operator failed to identify facts that, if proven on reopening, would constitute a meritorious defense.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a Judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). 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 will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

However, we emphasize that the 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 __, No. WEST 2021-0275 (Aug. 30, 2023). 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, Coal-Mac provides only a cursory explanation for its failure to respond to the Secretary's Petition and Chief Judge's Order, simply stating that the safety manager was unfamiliar with the contest process and that the proceedings defaulted due to his "error." We find that Coal-Mac has failed to meet its burden of showing that it is entitled to relief.

We have also held that operators are responsible for properly training all personnel who handle proposed assessments, and that failure to properly train such employees indicates an inadequate or unreliable internal processing system. *Cumberland Contura, LLC*, 40 FMSHRC 1129, 1130 (Aug. 2018); *Rogers Group, Inc.*, 39 FMSHRC 1551, 1554 (Aug. 2017); *Kentucky Fuel Corp.*, 38 FMSHRC 632, 634 (Apr. 2016). The Commission has made it clear that, where an operator fails to properly contest an assessment due to an inadequate or unreliable system, the operator has not established grounds for reopening. *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). Here, Coal-Mac asserts that its safety manager erred

because he was new to contesting assessments and lacked the proper knowledge.[2] This strongly suggests that the safety manager did not receive adequate training prior to being placed in charge of this task.

Having reviewed Coal-Mac's request and the Secretary's response, we conclude that the operator failed to establish good cause for reopening the captioned proceedings. Coal-Mac's motion to reopen provides no explanation for its failure to timely answer the Petition or respond to the Show Cause Order beyond a general statement of "error." We also find indications of an inadequate internal processing system. Accordingly, Coal-Mac's request to reopen is denied with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chai

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

[2] The Secretary questions the validity of Coal-Mac's claim of inexperience, noting the operator's size and its history of successfully navigating the contest process. While we do not question the *Safety Manager's* statement that he lacked knowledge regarding the contest process, we note that the operator (as a whole) clearly has experience with the process and reiterate that operators bear the responsibility of training their personnel.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 26, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. CENT 2023-0216 A.C. No. 41-03401-578784
v.	
BILLY COOPER STONE CO., INC., Respondent.	Mine: Cooper Stone

DECISION AND ORDER

Appearances: Maria C. Rich-DoByns, CLR, U.S. Department of Labor, MSHA, 1100 Commerce Street, Room 462, Dallas, TX 75242

Micah Flippen, Billy Cooper Stone Co., Inc., P.O. Box 678, Jarrell, TX 76537

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Billy Cooper Stone Co., Inc., ("Cooper Stone" or "Respondent"), pursuant to the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801.[1] This case involves two Section 104(a) citations with a total proposed penalty of $1,757.00.

The parties presented testimony and documentary evidence regarding the citation at issue at a virtual hearing held on November 15, 2023. MSHA Inspector Jason Hoermann testified for the Secretary. Billy Cooper Stone Co., Inc., owner Micah Flippen and employee Dan Wilson testified for the Respondent. After fully considering the testimony and evidence presented at hearing and the parties' post-hearing briefs, I **AFFIRM** Citation Nos. 9741862 and 9741863, as modified herein.

[1] In this decision, the joint stipulations, transcript, Secretary's exhibits, and Respondent's exhibits are abbreviated as "Jt. Stip.," "Tr.," "Ex. S–#," and "Ex. R–#," respectively.

II. STIPULATIONS OF FACT

At hearing, the parties agreed to the following stipulations:

1. Billy Cooper Stone Co., Inc., at all times relevant to these proceedings, engaged in mining activities and operations at the Cooper Stone Mine (Mine I.D. 41-03401) ("Cooper Stone") in Williamston County, Texas.

2. Billy Cooper Stone Co., Inc., is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ *et seq.* (the "Mine Act").

3. Billy Cooper Stone Co., Inc.'s mining operations affect interstate commerce within the meaning and scope of § 4 of the Mine Act, 30 U.S.C. § 803.

4. Respondent is an "operator" as defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Mine where the contested citations in these proceedings were issued.

5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to § 105 of the Mine Act.

6. The individual whose signature appears in Block 22 of the contested citations at issue in this proceeding is an authorized representative of the United States of America's Secretary of Labor, assigned to MSHA, and was acting in his official capacity when issuing the citations at issue in these proceedings.

7. The citations at issue in this proceeding were properly served upon Billy Cooper Stone Co., Inc., as required by the Mine Act.

8. The penalties associated with the violations in this docket if imposed, will not affect the Mine's ability to remain in business.

9. The Respondent agrees to withdraw contest of Citation No. 9741859 and agrees to pay the assessed penalty of $905.00.

10. The Respondent agrees to withdraw contest of Citation No. 9741860 and agrees to pay the assessed penalty of $905.00.

11. The Respondent agrees to withdraw contest of Citation No. 9741861 and agrees to pay the assessed penalty of $905.00.

12. The Parties agree that Citation No. 9741864 be modified from "Fatal" injury to "Permanently Disabling", and the penalty be modified from $905.00 to $407.00. For support of this modification, the Respondent asserts that the expected injury would not be as serious as alleged; the welder does not produce a high voltage. The Secretary under these specific circumstances agrees that the expected injury is more appropriately described as "Permanently Disabling."

13. The moving machine parts described in Citation No. 9741862 are required to be guarded to protect persons from contact per 30 C.F.R. § 56.14107(a).

14. The area described in Citation No. 9741863 is a roadway, over which vehicular traffic may travel.

15. The area described in Citation No. 9741863 is within the property boundaries of Cooper Stone, LLC, 3786 FM 487, Jarrell, Texas 76537.

16. Cooper Stone abated Citation No. 9741863 by placing berms along the roadway.

Tr. 6.

III. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

Billy Cooper Stone Co., Inc., operates the Cooper Stone Mine, a dimensional stone mine located in Williamston County, Texas. Tr. 13, 18-19; Jt. Stip. 1. On April 19, 2023, MSHA Inspector Jason Hoermann arrived at the mine to conduct a regular EO-1 inspection. Tr. 21. While inspecting the site, he was accompanied by two members of mine management, Dan Trejo and Dan Wilson. Tr. 23.

While inspecting the rock chopper area, Hoermann issued a citation for a splitter that did not have the proper guards. Tr. 34; Ex. S-1-1. Hoermann testified at hearing that the lack of guards on the machine presented an entanglement hazard. Tr. 36. While he could not recall at hearing whether he determined if the splitter was locked out or not, he stated that he would generally make a note during his inspection process if a piece of machinery was locked out. Tr. 40-41. His notes from this inspection did not state that the machine was locked out at the time he issued the citation. Tr. 41; Ex. S-3-2. Concerning the splitter's condition, rock was lying on the belt, dirt debris was located on top of a catch table, and a hammer and gloves that are typically used to clean off the machine were nearby. Tr. 41-42; Ex. S-1-4, S-1-5, S-1-6. No guards were lying in the area or installed on the machine and there were no signs of repair. Tr. 42-43. Hoermann testified that he would have issued the citation regardless of whether the splitter was locked out or not because this evidence indicated that it had been used in a condition without guards, exposing miners to a hazard. Tr. 41-43, 80.

Dan Wilson, one of the members of mine management who accompanied Inspector Hoermann on April 19, 2023, testified for the Respondent. He testified that the splitter had not been in use on the day of the inspection, nor was he aware of its use in the 70 days prior to that when he started his employment with Cooper Stone. Tr. 128-29. He did not check on the day of the inspection if the splitter was tagged out or not but stated that the splitter had been de-energized. Tr. 132-33. He also testified that it is common practice for employees to lay equipment down wherever there is space when it is not needed, as an explanation for the tools located in the splitter's vicinity. Tr. 131-32. Micah Flippen, owner of Cooper Stone, also testified that it was normal for employees to lay tools and other equipment "anywhere they wish[ed]" and that the company made every effort to ensure the machine was de-energized. Tr. 165-66. To

demonstrate that the machine had been locked out at the time of the citation, the Respondent submitted a photograph that could not be authenticated by Dan Wilson, who was present on the day of the inspection. Tr. 146-47; R-1.

When traveling on roads to inspect another area of the mine, Hoermann issued a citation for a missing berm on a 40-foot section of roadway. Tr. 50. The road appeared to be heavily traveled with equipment tracks and was narrow at only fifteen feet with an eight-foot drop-off leading to a pond. Tr. 51, 55-56. The inspector determined that this combination of conditions created a rollover hazard for vehicles traveling along the road. Tr. 57. Inspector Hoermann did not observe machinery operating on the road or mining equipment in the area but noted that there were signs that the area had been mined for dimensional stone, as evidenced by Vermeer saw cuts. Tr. 94-95, 109. He also testified that the area was moist where the berm had sloughed off. Tr. 95. Cooper Stone promptly terminated the violation by replacing the missing berm with blocks. Tr. 61-62.

Concerning the ownership of the road, Hoermann determined the road belonged to Cooper Stone because the road connected into a network of other roads and there was no signage or other indicators that demonstrated ownership by an entity other than Cooper Stone. Tr. 60-61. He also stated that if a mine's employees are traveling in an area, it is the mine's responsibility to correct any hazard an employee may be exposed to. Tr. 84. The Respondent presented evidence that the road was under the control of Heartland Quarries, a separate entity that leased the road from Cooper Stone, and asserted that Heartland was responsible for its maintenance. Tr. 136-39, 169-70, Ex. R-2, R-5. Mine employee Dan Wilson testified that Heartland Quarries had created new roads and manipulated roads that had been used by Cooper Stone in the past at its own discretion. Tr. 138-39. He admitted that the road where the citation was issued had been used by Cooper Stone in the past, but that it was not a normal travel way for Cooper Stone employees. Tr. 154-56, 161. Micah Flippen testified further that Heartland Quarries was in the process of stripping the area and had been manipulating the road and that Cooper Stone was not managing either the berm or the road at the time of the citation. Tr. 166, 169. Further, he testified that the largest piece of equipment owned by Cooper Stone is a "skid steer that is maybe six feet wide" and that they would not build a road that was so much wider than their equipment. Tr. 167. He also stated that rain had occurred in the area recently, explaining the moist ground that the inspector observed at the location of the citation, and that it was probable that the berm had sloughed off due to this recent rain. Tr. 169.

IV. DISPOSITION

A. Citation No. 9741862

During his inspection on April 19, 2023, Hoermann issued 104(a) Citation No. 9741862, which alleged:

> The head pulley for the discharge belt and the chopper chains were not guarded on the No. 3 Hydrasplit Chopper. The head pulley guards were missing[,] and the chain guard was lying on the ground. This condition exposes miners using the chopper to an entanglement hazard resulting in serious injuries.

Ex. S-1-1; Tr. 35-36.

Hoermann designated the citation as a non-significant and substantial violation of 30 C.F.R. § 56.14107(a) that was unlikely to cause an injury that could reasonably be expected to be "permanently disabling," would affect one miner, and was caused by Respondent's moderate negligence. Ex. S-1-1.

1. Fact of Violation

The Commission has long held that "[i]n an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). The burden of showing something by a "preponderance of the evidence," the most common standard in civil law and the standard applicable here, simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

30 C.F.R. § 56.14107(a) states that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

The Secretary asserts that it is undisputed by both parties that the machine did not have proper guards at the time of the citation and that there was no indication of ongoing repair. Sec'y Br. at 10-11. Further, the inspector testified that there was substantial evidence that the machine had been used without guards and that he would have issued the citation anyway regardless of whether the splitter was properly locked out. Tr. 41-43. Cooper Stone contends that the machine was in fact locked out and tagged out at the time the citation was issued but failed to present any testimonial evidence to that effect. Resp Br. at 1-2. While the Respondent submitted a photograph that appeared to show that the machine was locked and tagged out, this photograph could not be authenticated at hearing. Especially critical is the failure to establish when the splitter was locked and tagged out. Therefore, I cannot place much evidentiary weight on the photograph. Tr. 146-47; Ex. R-1. I do place weight on and credit the inspector's testimony that, even had the splitter been locked and tagged out, he would have issued the citation given the evidence it had been used without the presence of the required guards. Accordingly, I find that the Secretary has presented sufficient evidence to show that Cooper Stone violated 30 C.F.R. § 56.14107(a).

2. Gravity

Hoermann designated the citation as unlikely to cause an injury that could be reasonably expected to result in a permanently disabling injury. Ex. S-1-1. He testified at hearing that he selected "unlikely" because the machine was not in use at the time of his inspection and the machine was a spare. Tr. 43. He selected permanently disabling because the pulley located on the machine could grab loose clothing or a hand, leading to crushing injuries and possible amputation. Tr. 43-44. Because the splitter was not in immediate use, it was unlikely to cause

injury, so Hoermann marked the gravity as not significant and substantial. Tr. 44. Hoermann also testified that one person would be affected since one person would be injured by the head pulley at a time. Tr. 44. Respondent did not contest the gravity designations for this violation, and I find the designations made by the inspector to be appropriate.

3. Negligence

Under the Mine Act, operators are held to a high standard of care, and "must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." 30 C.F.R. § 100.3(d). MSHA's regulations define reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 C.F.R. § 100.3: Table X.

Hoermann marked the violation as moderate negligence because the violation was visible and it was obvious that the machine was unguarded, and because the operator had been cited in the past "for another guarding violation." Tr. 44-45. At the time of this citation, management stated that they did not know that the cited machine was unguarded, and never mentioned that the machine was locked out or was down for repairs during the inspection. Tr. 45-46. Hoermann testified that the operator should have been aware that machine parts should be guarded, but the Assessed Violation History Report does not indicate any such prior machine related guarding violations. Tr. 45. Ex. S-4-1. Because there is no evidence of the operator's previous history regarding such guarding violations, I lower the negligence from moderate to low.

B. Citation No. 9741863

During his inspection on April 19, 2023, Hoermann issued 104(a) Citation No. 9741863, which alleged:

> The roadway going to the upper bench at the main pit was missing a 40 ft section of berm. The roadway had an 8 ft drop off on the North side and tire tracks were observed within 2 ft from the edge. The roadway is used by mobile equipment to move blocks from the pit to the saw area. This condition exposes equipment operators to a [roll-over] hazard resulting in serious injuries.

Ex. S-2-1; Tr. 55-56.

Hoermann designated the citation as a significant and substantial violation of 30 C.F.R. § 56.9300(a) that was reasonably likely to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," would affect one miner, and was caused by Respondent's moderate negligence. Ex. S-2-1.

1. Fact of Violation

30 C.F.R. § 56.9300(a) provides that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment."

The Secretary argues that Cooper Stone violated this standard by failing to have a berm on a narrow road with an eight-foot drop-off. Owner operator Flippen testified that the road was not under Respondent's control, and that the area was not actively being mined by Cooper Stone. Instead, the road was being controlled and manipulated by Cooper Stone's, lessee, Heartland Quarries. I find that the ownership of the road in this matter is irrelevant to the issuance of a citation, because if a mine's employees are traveling on a road, per inspector Hoermann's credited testimony it is that mine's duty to ensure that the road is in compliance with all safety regulations. Tr. 84. I also note the parties stipulated to the fact that the road in question is within the property boundaries of Cooper Stone. Jt. Stip. 15. It is also undisputed that the road in question was missing a berm at the time of the citation. I affirm the finding that there was a violation of 30 C.F.R. § 56.9300(a).

2. Gravity and S&S

Hoermann designated the citation as reasonably likely to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty." Ex. S-2-1. He explained at hearing that the road was narrow and very compacted, which indicated heavy use. Tr. 57. He selected "lost workdays and restricted duty because the equipment would likely roll over on its side, leading to broken bones, sprains, contusions, and cuts. Tr. 57-58. The Respondent did not contest the gravity of the expected injury. I affirm the finding that the injury would likely result in lost workdays or restricted duty to one miner.

The citation was also designated as significant and substantial. To establish that a violation is significant and substantial, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature. *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020). The Commission has explained that "the proper focus of the second step of the [S&S] test [is] the likelihood of the occurrence of the hazard the cited standard is designed to prevent." *Newtown Energy, Inc*., 38 FMSHRC 2033, 2037 n.8 (Aug. 2016).

The Secretary has established a violation and therefore satisfies step 1. But the Secretary has failed to satisfy step 2 because she has not shown that the occurrence of a roll-over hazard is reasonably likely to occur to one of Respondent's employees. There are too many intervening factors to establish that the rollover hazard was reasonably likely, particularly concerning the lack of evidence demonstrating Respondent's use of the road. At the hearing, the inspector testified that he did not see equipment working in the area and that mine management were unaware of the berm's condition. Tr. 59, 109. Further, Respondent presented testimony at trial that indicates that the road was not in use at the time of the inspection. Tr. 166-69. Additionally,

Cooper Stone contends that their equipment is significantly narrower than the road itself. Tr. 167. The danger to Respondent's employees presented by the missing berm remained relatively remote given these facts. Accordingly, the berm violation was not S&S and I lower the likelihood of injury to unlikely.

3. Negligence

Hoermann determined that the violation was a result of Cooper Stone's moderate negligence. It was visible and obvious that the 40-foot section of berm was missing, but the mitigating circumstances of nobody using the road at the time of inspection and the lack of reporting about the situation decreased the negligence to moderate. Tr. 59. Further, the inspector determined that the road belonged to Cooper Stone because the road tied into the network of roads leading to the pit and there was no signage or barriers to indicate the road belonged to another entity. Tr. 60.

As stated above, it is the mine's duty to ensure compliance with safety regulations if their employees are traveling on a road, regardless of the actual ownership of the road. However, given the considerable mitigating circumstances and the low frequency that Cooper Stone was using the road at the time of the citation, I reduce Cooper Stone's negligence from moderate to low for this citation.

V. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (Mar. 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

> (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

For Citation No. 9741862, the Secretary proposed a regularly assessed penalty of $407.00. As discussed above, there is no evidence aside from the inspector's unsupported testimony regarding the operator's prior machine guarding violation history. It is undisputed that Cooper Stone is a small operator with approximately 30 employees. Tr. 21. The parties also stipulated that the penalty will not affect Cooper Stone's ability to continue in business. Jt. Stip. 8. As discussed above, I find that this non-S&S violation was unlikely to result in an injury causing permanently disabling injuries and was the result of Cooper Stone's low negligence. Finally, Cooper Stone demonstrated good faith by quickly terminating the citation. In light of these considerations, I find that a penalty of $350.00 is appropriate.

For Citation No. 9741863, the Secretary has proposed a regularly assessed penalty of $1,350.00. The mine operator has had berm violations in the past. Ex. S-4-1. The parties stipulated that the penalty will not affect Cooper Stone's ability to continue in business. Jt. Stip. 8. As discussed above, I find that this is a non-S&S violation that was unlikely to result in an injury causing lost workdays or restricted duty and was the result of Cooper Stone's low negligence. Finally, Cooper Stone Co., Inc., demonstrated good faith by quickly remedying the citation, even under the belief that they were not responsible for the missing berm. I have considered the representations and documentation submitted and conclude that a penalty of $600.00 is appropriate under the criteria set forth in Section 110(i) of the Act.

VI. ORDER

It is hereby **ORDERED** that Citation No. 9741862 is **AFFIRMED** as modified to reduce the negligence to low and that Citation No. 9741863 is **AFFIRMED**, as modified to reduce the likelihood of injury or illness to "Unlikely", reduce the negligence to low, and to remove the S&S designation. Billy Cooper Stone Co., Inc, is **ORDERED** to pay the Secretary the total sum of **$950.00** within 40 days of this order.[2]

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

Distribution: (Electronic and Certified mail)

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[2] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 31, 2024

PEABODY GATEWAY NORTH MINING, LLC, Contestant	CONTEST PROCEEDING Docket No. LAKE 2023-0075 Citation No. 9039082; 01/24/2023
v.	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA, Respondent	Mine: Gateway North Mine Mine ID: 11-03235

ORDER GRANTING SECRETARY'S MOTION FOR SUMMARY DECISION AND DENYING CONTESTANT'S MOTION FOR SUMMARY DECISION

Before: Judge Lewis

This case is before me upon notice of contest filed by Peabody Gateway North Mining, LLC ("Peabody" or "Contestant") under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

On March 6, 2023, Peabody submitted a Motion for Summary Decision and Memorandum of Points and Authorities in Support of Motion for Summary Decision. In the Motion, Peabody requested that this Court vacate this docket. On March 23, 2023, the Secretary of Labor filed a Response to Contestant Peabody Gateway North Mining, LLC's Motion for Summary Decision, both opposing the Contestant's motion and cross-moving for summary decision. I denied the cross-motions for summary decision on April 3, 2023, because there was not agreement on the material facts of the case.

The following day, Contestant filed an unopposed Motion for Reconsideration of this Court's April 3, 2023, order, stating that this Court's denial of the cross-motions was premature pursuant to Commission Procedural Rules 10(d) and 67(d), 29 C.F.R. §§ 2700.10(d) and 2700.67(d), which entitled Peabody to file a response to the Secretary's cross-motion for summary decision. The Motion was accompanied by a Response in Opposition to Secretary of Labor's Cross-Motion for Summary Decision. I granted Peabody's Motion for Reconsideration on April 6, 2023. After reviewing Contestant's Response in Opposition dated April 4, 2023, and the Secretary's subsequent Response dated April 18, 2023, I issued an order denying the parties' cross-motions on May 18, 2023.

Before me are Peabody's Renewed Motion for Summary Decision dated July 18, 2023; the Secretary's Renewed Cross-Motion for Summary Decision dated July 28, 2023; and Peabody's Response in Opposition dated August 9, 2023. The Court may grant summary decision where the "entire record…shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see also UMWA, Local 2368 v. Jim Walter Res., Inc.*, 24 FMSHRC 797, 799 (July 2002); *Energy West Mining*, 17 FMSHRC 1313, 1316 (Aug. 1995) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), which interpreted Fed.R.Civ.P. 56). "There is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor." *Greenberg v. Bellsouth Telecommunications, Inc.,* 498 F.3d 1258, 1263 (11th Cir. 2007) (citation omitted). The court must evaluate the evidence "in the light most favorable to … the party opposing the motion." *Hanson Aggregates*, 29 FMSHRC at 9.

In their respective submissions, the parties have confirmed that the material facts are uncontested and have submitted facts that show as much. *Contestant's Renewed Motion for Summary Decision*, 1; *Secretary's Renewed Motion for Summary Decision*, 1. As agreed-upon by the parties, the relevant facts are as follows. On December 08, 2022, MSHA issued Citation No. 9541193, alleging in the Condition or Practice section that on December 05, 2022, a main fan outage occurred that required miners to be withdrawn from the mine. Miners then re-entered the mine with the section foreman and traveled back to the working sections before an examination was conducted by certified examiners as required by 75.360(h) through (e). The Citation was marked as Significant and Substantial, as well as constituting an unwarrantable failure to comply with a mandatory standard.

On January 5, 2023, MSHA issued an information request related to Citation No. 9541193, requesting, *inter alia*, the contact information for all miners working the evening shift on December 5, 2022. *Cont. Ren. MSD*, 2; *Secy. Ren. MSD*, 2. On January 17, 2023, Peabody supplied some of the information sought, but refused to produce contact information for eight miners, stating that "miners who may be considered agents of the operator on that shift may be contacted through counsel." *Cont. Ren. MSD*, 2; *Secy. Ren. MSD*, 2, SX-B. On January 19, 2023, MSHA issued a second set of requests and, among other information sought, repeated its previous demand for the personal contact information for all miners that worked on the evening shift of December 5, 2022, including those that "may be considered agents of the operator." *Cont. Ren. MSD*, 2; *Secy. Ren. MSD*, 2, SX-C. Peabody responded on January 23, 2023, by again refusing to supply the contact information of the eight miners "who may be considered agents of the operator," and stating that those miners "may be contacted through counsel." *Cont. Ren. MSD*, 5; *Secy. Ren. MSD*, 2, SX-D. On January 24, 2023, MSHA issued Citation No. 9039082 for Peabody's refusal to provide the contact information of the eight miners that it stated were agents of the operator. *Cont. Ren. MSD*, 6, CX-H; *Secy. Ren. MSD*, 2.

The Condition or Practice section of Citation No. 9039082 alleges as follows:

> On January 5, 2023, the Mine Operator received a request for information from MSHA regarding case VINC-CSI-2023-02. The Mine Operator was given 11 days to comply with the due date of January 16, 2023. The Operator did not request an extension or provide all of the requested information. On January 17, 2023, the

> Operator sent a partial inadequate response to the request for information. On January 19, 2023, MSHA requested additional information and requested that the original request be complied with fully by January 23, 2023 by 12:00 p.m. Central Time. As of 12:00 noon on January 23, 2023, the Operator has not responded in full by providing the information from items #2 and #3 on the initial request. At this time the operator has not complied and daily penalties will be requested to gain compliance from the operator.
>
> The Operator's failure to provide the requested information is a violation of Section 103(a)(h) of the Mine Act.

Contestant, in its briefs and exhibits, provides ample evidence that the eight individuals in question could be considered agents of the operator on the date in question, and the Secretary argues that the status of these miners is irrelevant. *Secy. Ren. MSD*, 3. Therefore, for the purposes of this analysis, this Court will assume that the eight miners are agents and address the validity of Citation No. 9039082.

Section 103(a)(h) of the Mine Act, which the Citation alleges was violated, states as follows:

> (a) Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

> (h) In addition to such records as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary or the Secretary of Health, Education, and Welfare may reasonably require from time to time to enable him to perform his functions under this Act. The Secretary or the Secretary of Health, Education, and Welfare is authorized to compile, analyze, and publish, either in summary or detailed form, such reports or information so obtained. Except to the extent otherwise specifically provided by this Act, all records, information, reports, findings, citations, notices, orders, or decisions required or issued pursuant to or under this Act may be published from time to time, may be released to any interested person, and shall be made available for public inspection.

30 U.S.C. § 813(a)(h).

Citing the Seventh Circuit case, *Big Ridge v. FMSHRC*, 715 F.3d 631 (7th Cir. 2013), Contestant argues that under applicable law, a request by MSHA under Section 103(h) for documents or information not required to be maintained must be "reasonable." *Contestant's Memorandum of Points and Authorities*, 7. Specifically, a reasonable request must be limited in scope, manner, and time, which it interprets as "information needed by the agency to verify a specific point of compliance and is conducted by appropriate means." *Id.* at 7-8. The Contestant states that with regard to the contact information of miners that were agents of the operator, "MSHA presumably made this request so that it could have contacted agents without company counsel's involvement," and that such a request is unreasonable under *Big Ridge*. *Id.* at 8. Contestant argues that as agents of the operator, these miners' statements may be imputed to the company for purposes of negligence and unwarrantable failure. *Id.* at 10-11. Citing attorney-client privilege and the transcript from an ALJ hearing, the Contestant argues that MSHA was not permitted to interview a supervisor without company counsel present. *Id.* at 11-12.

The Secretary similarly cites *Big Ridge* to argue that its request for the contact information for the eight miners at issue under Section 103(h) was reasonable. *Secy. Ren. MSD*, 4-5. In the instant case, MSHA argues that its requests were limited to personal contact information of miners working on a single relevant shift and that they were necessary to offer confidential interviews to miners during the course of an investigation. *Id.* 4-6. Furthermore, it argues that Contestant's claims are not ripe for determination because MSHA routinely contacts miners during an investigation and offers them the ability to give a confidential interview. *Id.* 6. It is only if a miner declines to act as a government informant that MSHA has an obligation to determine if the miner is an agent and represented by counsel. *Id.* The Secretary argues that the Contestant's allegations that it is trying to circumvent counsel for illegitimate purposes are premature and incorrect. *Id.* at 6-7.

Section 103(h) of the Mine Act provides that, "In addition to such records as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary … may reasonably require from time to time to enable him to perform his functions under this Act." 30 U.S.C. § 813(h). In *Big Ridge*, the Seventh Circuit considered whether MSHA had the authority

under Section 103(h) to require mine operators to permit MSHA inspectors to review employee medical and personnel records in order to verify that operators were not underreporting injuries and illnesses. The Court affirmed MSHA's authority to demand such documents, holding that "the [Mine] Act grants MSHA broad inspection and document review powers, including the power to 'reasonably require' mines to provide information that would enable MSHA to perform [its] functions under [30 U.S.C. § 813(h)]" 715 F.3d at 638. The Court defined a "reasonable" demand as one that is "limited in scope, manner, and time." *Id.* at 641-642. In *Big Ridge*, the Court found that the scope was reasonable because it included only the information needed to verify injury and illness reporting compliance; the manner was reasonable because MSHA requested "only to inspect and copy the relevant records, not to rummage through mine offices;" and the time limits were reasonable because they only covered records for one year. *Id.* at 642. Furthermore, the Court highlighted that "verifying compliance with the Mine Safety Act and relevant regulations is one of the express purposes for which Section 813(a) authorizes MSHA to inspect and investigate mines." *Id.*

Applying the *Big Ridge* test for reasonableness to the instant case, I find that MSHA's request for the personal contact information of the miners working on the shift at issue was reasonable. MSHA issued its information request in this case as part of an investigation into an alleged fan outage and subsequent failure to perform a Section 313(d) investigation on December 05, 2022. The request was limited in scope as it did not demand the personal contact information of all miners, but only those related to the investigation into the alleged violation. The request was limited in time as it only asked for the contact information of the miners working on a single shift on the date of the alleged violation. Lastly, the manner here was reasonable because MSHA asked the company to provide relevant records it had on hand rather than sending inspectors to "rummage through mine offices" for the personal contact information of miners.

The Secretary has stated that the primary reason it needs the personal contact information of the miners who worked the shift at issue is to offer them confidential interviews as government informants. The Secretary's right to interview miners is central to the functioning of the Mine Act. *See BHP Copper, Inc.*, 21 FMSHRC 758, 765 (July 1999) ("Unless the Secretary's right to be on mine property and investigate accidents is a hollow one, it must carry with it the right to interview witnesses."). Miners who participate in MSHA interviews are entitled to have their identities withheld in order to prevent retaliation. The Mine Act and its legislative history highlight the importance of providing confidentiality to government informants. Section 103(g)(1) of the Act requires that the names of miners who complain of safety violations be removed from the notice provided to operators. 30 U.S.C. § 813(g)(1). The legislative history of the Mine Act explained the reasoning for such confidentiality:

> The Committee is aware of the need to protect miners against possible discrimination because they file complaints, and accordingly, the Section requires that the name of the person filing the complaint and the names of any miners referred to in the compliant not appear on the copy of the complaint which is served on the mine operator. While other provisions of the bill carefully protect miners who are discriminated against because they exercise their rights under the Act, the Committee feels that strict confidentiality of complainants under Section [103(g)(1)] is absolutely essential.

S. Rep. No. 95-181, at 29, *reprinted in Legis. Hist.* at 617, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977* (1978). Citing to this legislative history, the Commission stated that:

> The reasoning behind this right to confidentiality is considered so persuasive that the Commission adopted a version of the right for Commission proceedings, recognizing that witnesses who qualify for it should generally be protected by the informant's privilege. *See Sec'y on behalf of Logan v. Bright Coal Co.*, 6 FMSHRC 2520, 2524-25 (Nov. 1984); *see also* Commission Procedural Rule 61, 29 C.F.R. § 2700.61 ("A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.").

Sec'y obo McGary and Bowersox, et al. v. Marshall County Coal Co., et al., 38 FMSHRC 2006, 2014 (Aug. 2016). MSHA has a right and responsibility to contact miners during an investigation to offer them the opportunity to make confidential statements as government informants. Therefore, similar to the facts in *Big Ridge*, MSHA's information request here is also "relevant to the goals of the statutory scheme and the government's interest in miner safety." 715 F.3d at 646.

The Contestant argues that since the miners at issue were agents of the operator, then MSHA can only contact them through counsel. However there appears to be no justification in the Mine Act or caselaw that miners who are supervisors, or otherwise can be considered agents of the company, lose their rights under the Mine Act to make confidential safety complaints to MSHA. To require MSHA to have company counsel present while informing miners of their rights to make confidential complaints, and while conducting confidential interviews, would effectively strip these miners of their rights. The Secretary is limited in certain ways that it can interview agents of the operator, but not in providing a miner the opportunity to make confidential safety complaints to the government.[1]

This Court is in agreement with the Secretary that many of Contestant's claims and arguments are premature and speculative. Contestant argues that MSHA is attempting to circumvent counsel and violate attorney-client privilege by requesting the personal contact information of miners. *Cont. Ren. MSD*, 10-12. While there is certainly the possibility that MSHA would abuse the information it received, there is no evidence in this case that it planned to do so.[2] If, at some future point, the Secretary were to use the personal contact information of a

[1] Obviously, nothing would prevent Contestant prior to its disclosure of requested contact information to MSHA, from notifying employees whom it deemed to be agents of the operator during the time period in question, to seek, if they so wished, advice from Contestant's counsel, before speaking with MSHA.

[2] Indeed, in almost every legal proceeding, there is the possibility that a lawyer will abuse information that it receives, leak discovery documents, or otherwise act in an unethical manner. However, courts must presume that lawyers will act in an ethical manner, absent evidence to the contrary.

miner agent to interview him after he declined to serve as a government informant, then the Contestant would not be without recourse. As illustrated by Contestant's citation to the transcript provided in CJ-X, where Judge McCarthy struck the testimony of a miner after determining that the witness was a supervisor and MSHA had not notified company counsel of the interview, Contestant can object to the use of any improperly gathered information from the miners at issue. However, the possibility that MSHA may misuse the contact information provided is not grounds for withholding it in advance, in violation of Section 103(h).

Accordingly, the Secretary's Motion for Summary Decision is **GRANTED** and the Contestant's Motion for Summary Decision is **DENIED**. Citation No. 9039082 is **AFFIRMED** and Contestant is **ORDERED** to provide MSHA the information sought in the January 5, 2023, and January 19, 2023, information requests within 30 days of this Order.

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

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