FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

December 14, 2020

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2020-0270
v.	:	A.C. No. 46-02805-499009
	:	
U.S. SILICA	:	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY Rajkovich, Chairman, and Traynor, Commissioner:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On February 25, 2020, the Commission received from U.S. Silica 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 September 16, 2019, and became a final order of the Commission on October 17, 2019. U.S. Silica asserts that its failure was the result of a confusing set of circumstances.[1] The affidavit of the plant manager says that the plant's safety manager left the company on November 1, and that the plant had instructed him to contest the penalties in this matter when the proposed assessment was received in September, 2019. The affidavit further says that it assumed that the contest had been timely submitted before the safety manager left his job at the plant. Sometime later, the motion contends that the operator received confusing and inaccurate billing and payment statements from MSHA, and was working with the agency to correct those.

The affidavit states that the operator was unaware that the contest may not have been timely filed until it received a delinquency notice, which was mailed on December 2, 2019. The motion states that it made a check request to pay the outstanding balance MSHA claimed was due, and that it calculated the penalties due for the citations it did not wish to contest. The motion includes a copy of the contest form with the citations checked. However, the motion concedes that it does not appear that the contest form was filled out and submitted with the payment of uncontested penalties.[2] The affidavit mentions an investigation, but neither the motion nor the affidavit explains why the motion to reopen was not filed until nearly three months after the delinquency notice was mailed. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed U.S. Silica's request and the Secretary's response, we find that the operator has failed to fully explain its delay in filing its motion to reopen once it learned that the matters it wished to contest had become final. We have held that an operator must explain any delay in acting once it learns that a contest has not been timely filed. *Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010) "Further, we have emphasized the importance of the operator's explanation of the time it took to file for reopening after receipt of a notice of delinquency." *Lone Mountain Processing, Inc.* 35 FMSHRC 3342, 3346 (Nov. 2013) *citing Highland Mining Co.*, 31 FMSHRC 1313, 1315-17 (Nov. 2009). An operator's failure to explain any delay beyond 30 days in seeking relief is grounds for denial of the motion.

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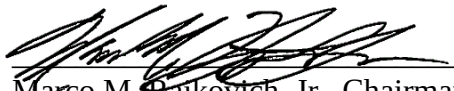
[1] The motion itself is somewhat confused. It the opening paragraph, it asserts that "the respondent's Answer to the Secretary's Proposed Assessment of Civil Penalty . . . was not filed because the Secretary never issued a Proposed Assessment of Civil Penalty." Mot. to Reopen at 1. But the beginning of the next paragraph acknowledges that the proposed assessment "was issued by MSHA on 9/10/2019." *Id.* Later, the motion states that "The Secretary never filed the Proposed Assessment of Civil Penalty to which the respondent could have filed an Answer." It is possible that the operator has conflated the duty to answer a penalty *petition*, but that duty is irrelevant where, as here, the operator has never triggered the Secretary's obligation to file a petition by contesting the penalties in the first instance.

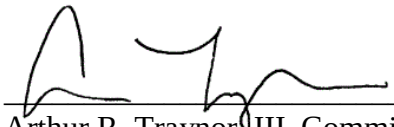
[2] The motion implies that the operator intended to send its payment and its notice of contest to the same address. However, the contest form instructions clearly state that notices of contest must be mailed to MSHA's Civil Penalty Compliance Office in Arlington, VA, whereas payments are sent to a different address in St. Louis. As we have noted in previous cases, this is a common misunderstanding among mine operators.

In this case, the motion was not filed until nearly three months after the Secretary mailed the delinquency notice. While the affidavit states that the operator investigated the matter, the motion cites no extraordinary circumstances or other explanation for its failure to act promptly once its failure was known

While the operator's excuse for its initial failure to contest the penalties is plausible and well-supported, it has failed to explain its delay in acting once it discovered it had not contested the penalties as it had intended. Therefore, in the interest of justice, we direct the operator to show cause within 20 days of the date of this order why the Commission should not deny this motion and dismiss this matter with prejudice due to the delay of approximately seven weeks beyond the 30 days the Commission has determined to be a reasonably prompt response upon discovering a default. If the operator fails to submit a reasonable explanation within the time provided by this order, the Commission shall dismiss this docket with prejudice and order payment of the outstanding penalties.



Marco M. Rajkovich, Jr., Chairman



Arthur R. Traynor, III, Commissioner

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