FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

April 14, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. THOMAS CRUSHING, LLC	Docket No. CENT 2024-0238 A.C. No. 03-00052-594930

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

ORDER

BY: Jordan, Chair, 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 11, 2024, the Commission received from Thomas Crushing, LLC ("Thomas Crushing") 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), 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).

The Department of Labor's Mine Safety and Health Administration ("MSHA") indicates that the proposed assessment was delivered to the operator on March 28, 2024. The assessment became a final order of the Commission on April 29, 2024.

MSHA issued a citation to Thomas Crushing on August 30, 2023. On September 5, 2023, its managing member Michele Thomas emailed a request for an MSHA Safety and Health Conference. On September 22, 2023, Ms. Thomas emailed MSHA's penalty contest division indicating the lack of response to its request for a conference and wanting to ensure that a conference was scheduled or that in the alternative "the citation contest is started." Op. Exs. 2 and 3. MSHA acknowledged receipt and stated that someone would reach out directly. Op. Ex. 3. According to Thomas Crushing, the operator received no further correspondence concerning its request or its contest of the citation. Thomas Crushing received the proposed assessment on March 28, 2024, but did not respond because it believed its September 22 email served as its contest in the absence of a conference. Thomas Crushing learned that the proposed assessment had become a final order on April 30, 2024, when its counsel informed it that MSHA's mine data retrieval system showed that a final order had been entered on April 27.

Thomas Crushing argues that there is good cause to reopen because its inadvertent failure to respond to the proposed assessment was due to its mistaken belief that it had already communicated its intent to contest the citation if a conference was not held. Its practice in the past has been to timely request a conference so that the parties can reach a resolution of the citations. It followed the same practice by timely requesting the conference and followed up on the request. Further, it was told by MSHA that someone would be reaching out directly, but "MSHA did not follow up as represented." Thomas Crushing asserts that it acted in good faith and within six days of receiving the citation. Its timely request for a conference and its follow up indicates its intent to contest the citation and demonstrated that it did not act with any purpose of evading the citation or delaying a response. It will prevent similar mistakes from occurring by timely responding directly to any future proposed assessment, "if the opportunity to participate in a . . . conference with MSHA cannot be had."

The Secretary opposes, arguing that Thomas Crushing did not file its motion to reopen in good faith because it omitted crucial communications with MSHA on September 22, 2023.[1] Specifically, MSHA email records confirm that contrary to Ms. Thomas's claims, she did in fact continue to correspond with MSHA that day, via telephone and email. MSHA's email records confirm that after Ms. Thomas sent the email on September 22, someone from MSHA spoke with her on the phone where they explained that "the citation ha[d] not been assessed yet," "how to contest once she receives a statement," and "explained how the process works so she is good." Sec'y Attachment E. Ms. Thomas sent a subsequent email that day confirming that she had been talking with MSHA "and now ha[s] a clearer understanding." *Id*. at Attachment F. This communication with MSHA belies Thomas Crushing's statement that it had no further correspondence from MSHA, and demonstrated that by its own admission, Thomas Crushing understood the contest process.

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[1] On July 5, 2024, the Secretary of Labor filed an unopposed motion for an extension of time to file her response to Thomas Crushing's motion to reopen. Upon review of the Secretary's motion, we grant the Secretary's extension and accept this response as timely filed.

According to the Secretary, Thomas Crushing's credibility is questionable given the clear instructions provided. The Secretary states that requesting a conference is not enough to justify reopening. Plus, the operator has failed to explain why it still believed its conference request, which is not mentioned in the assessment, counted as a contest after receiving instructions to the contrary. Moreover, the operator was not proactive in following up on this matter for 7 months after speaking to MSHA in September 2023, nor has it adequately explained its delay in seeking relief. After learning of the delinquency on April 30, 2024, Thomas Crushing did not file its motion to reopen until 42 days later, which the Secretary contends was not reasonable and was outside of the Commission's 30-day safe harbor. The Secretary argues that the motion should be denied with prejudice.

It is well recognized in federal jurisprudence that the issue of whether the movant acted in good faith is an important factor in determining the existence of excusable neglect. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993); *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006). Likewise, the Commission has recognized that a movant's good faith, *or lack thereof*, is relevant to a determination of whether the movant has demonstrated mistake, inadvertence, surprise or excusable neglect within the meaning of Rule 60(b)(1) of the Federal Rules of Civil Procedure. *Lone Mountain Processing, Inc.*, 35 FMSHRC at 3346; *MM. Sundt Constr. Co.*, 8 FMSHRC 1269,1271 (Sept. 1986); *Easton Constr. Co.*, 3 FMSHRC 314, 315 (Feb. 1981).

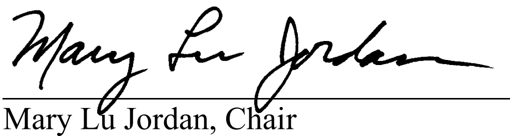
In addition, the party seeking to reopen a final penalty bears the burden of showing that it is entitled to such relief, through a detailed explanation of its failure to timely contest the penalty or answer the Secretary's petition, and any delays in filing for reopening. *See Essroc Cement Corp*., 40 FMSHRC 1147, 1148 (Aug. 2018); *Dynamic Energy, Inc*., 39 FMSHRC 1560, 1561 (Aug. 2017); *Higgins Stone Co*., 32 FMSHRC 33, 34 (Jan. 2010); *Lone Mountain Processing, Inc*., 35 FMSHRC 3342, 3345 (Nov. 2013).

We find that Thomas Crushing acted in bad faith by omitting key details and submitting a verifiably false affidavit in support of its motion to reopen. In the affidavit, Ms. Thomas attests that "[n]either an MSHA specialist nor T. Brittingham [MSHA] ever followed up with me concerning" the September 22 request of a safety and health conference. However, the record shows that, to the contrary, an MSHA representative did in fact speak with Ms. Thomas immediately following her September 22 email and explained to her the contest process. Ms. Thomas even confirmed the communication by email and confirmed her understanding of the process. To date, Thomas Crushing has submitted nothing to the Commission correcting the factual misrepresentation in its motion to reopen. *Essroc Cement*, 40 FMSHRC at 1148 (the operator filed a response correcting the record after MSHA records demonstrated that its motion to reopen contained inaccuracies).

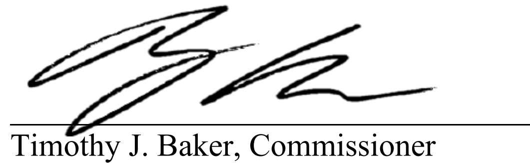
Moreover, Thomas received instructions again on the contest process when it received the assessment six months later. However, the operator failed to explain why it continued to believe that its conference request could serve as its contest after receiving contest instructions on two occasions. Thomas also neglects to explain why it took 42 days to file its motion to reopen after first learning it was delinquent. The Commission has held that an operator who files a motion to reopen more than 30 days after receiving notice of its default must explain its delay

in requesting relief. *See Highland Mining Co*., 31 FMSHRC 1313, 1316-17 (Nov. 2009). Failure to provide such an explanation may be grounds for denying the motion. *Id*.

Having reviewed Thomas Crushing's motion and the Secretary's response, we conclude that the operator acted in bad faith and has failed to provide a detailed explanation of its failure to timely contest the penalty and why it delayed in filing its motion to reopen. "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 Mining, LLC*, 46 FMSHRC 9, 10 (Jan. 2024). In the instant matter, the operator has failed to establish good cause for reopening the above-referenced case. Accordingly, Thomas Crushing's motion to reopen is denied with prejudice.



Mary Lu Jordan, Chair



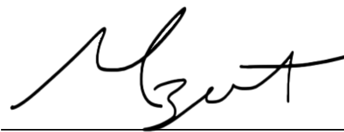
Timothy J. Baker, Commissioner

Commissioner Marvit, concurring,

I write to agree with the Majority in this case for the reasons set forth below.

In *Explosive Contractors*, 46 FMSHRC 965 (Dec. 2024), I dissented and explained that Congress did not grant the Commission the authority to reopen final orders under section 105(a) of the Mine Act. The Commission's repeated invocation of Federal Rule of Civil Procedure 60(b) cannot overcome the statutory language. However, in *Belt Tech*, I explained in my concurrence that "the Act clearly states that to become a final order of the Commission, the operator must have received the notification from the Secretary." 46 FMSHRC 975 (citing *Hancock Materials, Inc.*, 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

In the instant case, as the Majority recounts, the Commission's order became final under the language of section 105(a). The Majority denies reopening in its opinion because the operator has not alleged good cause or provided a factual accounting for its failure to timely contest the penalties. Though I believe the Commission lacks the authority to consider motions to reopen, I concur with the Majority in denying reopening in this matter.



Moshe Z. Marvit, Commissioner

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