

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 8, 2023

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 2022-0127
ADMINISTRATION (MSHA)	:	A.C. No. 15-18068-548406
	:	
v.	:	
	:	
STERLING MATERIALS	:	
	:	

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

ORDER

BY: Jordan, Chair; Althen and Rajkovich, 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 September 9, 2022, the Commission received from Sterling Materials (“Sterling”) a motion to reopen final orders 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 24, 2022 and became a final order of the Commission on February 23, 2022. Thereafter, MSHA received partial payment of the civil penalties. On April 12, 2022, MSHA sent the operator a delinquency notice. The operator then sent additional payments in satisfaction of the total assessed penalty for the six citations at issue in the assessment.

Sterling asserts that it intended to contest the civil penalty associated with Citation No. 9870856, but failed to timely file contest as a result of a clerical error. Sterling maintains that it confused the status of Citation No. 9870856 with the status of a similarly numbered citation (Citation No. 9870855). Sterling had previously timely filed to contest the proposed penalty for the similarly numbered citation.¹ The Secretary does not oppose the operator’s motion to reopen.

Having reviewed Sterling’s request and the Secretary’s response, we find that Sterling demonstrated that its failure to timely file to contest the proposed penalty for Citation No. 9870856 was due to a mistake and clerical error. In the interest of justice, we hereby reopen the contest of this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chair


William I. Althen, Commissioner


Mateo M. Rajkovich, Jr., Commissioner

¹ Sterling’s motion mistakenly states that Citation No. 9870855 was part of Docket No. KENT 2021-0129. In fact, Citation No. 9870855 was contained in Docket No. KENT 2021-0130.

Commissioner Baker, dissenting:

In this case, Sterling Materials failed to timely contest a proposed penalty and then paid the amount owed. For the reasons set forth in my dissent in *Omya Inc.*, 45 FMSHRC ___, 2023 WL 2559811 (Mar. 9, 2023), I do not believe it is accurate to characterize this action as a justifiable mistake or excusable neglect.

Therefore, I would deny its motion to reopen.



Timothy J. Baker, Commissioner

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