

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

June 11, 2024

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE 2023-0127
ADMINISTRATION (MSHA)	:	A.C. No. 40-00130-575069
	:	
v.	:	Docket No. SE 2024-0156
	:	A.C. No. 40-00130-575069
DYNO NOBEL	:	

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

ORDER

BY: Jordan, Chair; Althen and Rajkovich, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On June 24, 2023, the Commission received from Dyno Nobel 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).¹

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

¹ The motion to reopen was erroneously filed under the docket number assigned to the related contest proceeding rather than being assigned a separate civil penalty proceeding docket number. We have corrected this docketing error, and the correct docket number appears in the caption of this order. We hereby consolidate Docket Nos. SE 2023-0127 (contest proceeding) and SE 2024-0156 (civil penalty proceeding) because they both involve contests relating to Citation No. 9420749. 29 C.F.R. § 2700.12.

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 U.S. Postal Service (“USPS”) attempted delivery of the proposed assessment to Dyno Nobel’s address of record on April 22, 2023. On April 28, 2023, USPS marked the assessment package “Return to Sender Processed – Moved, Left no Address.” The assessment became final on May 22, 2023. Dyno Nobel filed a motion to reopen on June 24, 2023, and the Secretary mailed a delinquency letter on July 7, 2023.

Dyno Nobel asserts the assessment was not timely contested due to administrative mistake and inadvertence. Dyno Nobel states that it timely contested the underlying citation on March 14, 2023. On or about June 15, the contractor realized it had not received a proposed assessment for the citation, learned the penalty had become final, and promptly filed a motion to reopen. Dyno Nobel was ultimately unable to locate the assessment package or determine how or when the package was delivered, and notes that it does not maintain a permanent presence at the mine site where the relevant citation was issued.

The Secretary opposes the motion to reopen. She asserts that Dyno Nobel did not receive the assessment package because it failed to update its address of record with either MSHA or USPS. She notes that the assessment package was mailed to the contractor’s address of record on file with MSHA, but USPS was unable to complete delivery because the contractor had moved without providing a forwarding address. The Secretary emphasizes the importance of maintaining an up-to-date address of record for independent contractors (30 C.F.R. § 45.5), and states that Dyno Nobel’s failure to fulfill its legal responsibility does not constitute excusable neglect warranting reopening.

Documentation provided by the Secretary shows that Dyno Nobel failed to update its address. However, the record also shows that Dyno Nobel has expressed a clear intent to contest the citation. *See Carmeuse Lime & Stone, Inc.*, 45 FMSHRC 179, 180 (Apr. 2023) (crediting the operator for initiating contest proceedings as indicia of intent to contest). Additionally, Dyno Nobel proactively sought out information on the penalty assessment, and promptly filed a motion to reopen upon learning the assessment had become final. Notably, Dyno Nobel filed its motion less than two weeks after learning of the assessment, and two weeks *prior* to the Secretary’s issuance of a delinquency letter. *See Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (“[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”). It also appears Dyno Nobel has successfully filed changes of address prior to 2015, indicating that the failure to update its address was a single inadvertent failure to act rather than a repeated error.

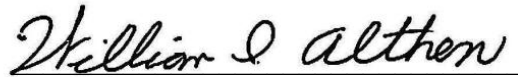
Having reviewed Dyno Nobel’s request and the Secretary’s response, we find that Dyno Nobel’s failure to timely respond to the penalty assessment was the result of excusable inadvertence in this instance. *See ITAC*, 46 FMSHRC 80 (Feb. 2024) (reopening where an

assessment was mailed to an out-of-date address of record, the operator proactively checked the former address for missing packages, contacted MSHA within a day of learning of its error, and filed to reopen within 30 days of discovering the assessment). However, we note that a *repeated* failure to update one's address of record would likely indicate an inadequate internal process, and may result in future motions to reopen being denied.

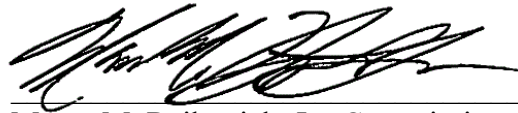
In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



Mary Lu Jordan, Chair



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner

Commissioners Baker and Marvit, dissenting:

We respectfully dissent.

In the instant case, undisputed records indicate that MSHA's assessment was delivered to Dyno Nobel's address of record on April 22, 2023. On April 28, 2023, USPS marked the assessment package "Return to Sender Processed – Moved, Left no Address." The assessment became final on May 22, 2023. Dyno Nobel's excuse for its failure to respond to the proposed assessment in a timely manner is that it never received the assessment. However, the Secretary noted that the operator did not receive the assessment because it failed to update its address of record with either MSHA or USPS.

Section 109(d) of the Mine Act requires each operator of a coal or other mine to file with the Secretary of Labor the name and address of such mine, the name and address of the person who controls or operates the mine, and any revisions in such names or addresses. 30 U.S.C. § 819(d). Under the authority granted by the Act, the Secretary has promulgated regulations requiring an operator to provide MSHA with, among other things, its correct address of record. 30 C.F.R. § 41.11. If any changes occur with respect to this information, an operator is required to notify MSHA of the change within 30 days of its occurrence. 30 C.F.R. § 41.12. Any failure by an operator to notify MSHA in writing of a change is considered a violation of Section 109(d) of the Act and subject to a civil penalty as provided in section 110 of the Act.² 30 C.F.R. § 41.13. In essence, Dyno Nobel's argument is that the case should be reopened because it failed to follow the statutory and regulatory requirements under the law.

The Commission has previously denied motions to reopen, in part, because the operator failed to maintain its correct address of record. *See Southwest Rock Prod., Inc.*, 45 FMSHRC 747, 748-49 (Aug. 30, 2023); *see also ITAC*, 46 FMSHRC 80, 83 (Feb. 2024) (Baker, dissenting). In addition, the Commission has previously held 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. *See, e.g., 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).

The operator's failure to update its address of record does not constitute excusable neglect. In fact, the explanation is itself an independent violation of the Mine Act that could

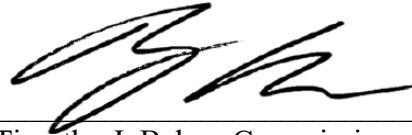
² The regulations further provide:

Service of documents upon the operator may be proved by a post office return receipt showing that the documents could not be delivered to such address of record because the operator had moved without leaving a forwarding address or because delivery was not accepted at that address, or because no such address existed.

30 C.F.R. § 41.30; *see also* 30 C.F.R. § 45.6 (applying this same rule to independent contractors).

have been cited. Rather than excuse the operator's failure to timely contest the citation, it compounds the error. We note that the Secretary opposes reopening.

Therefore, we would find that Dyno Nobel failed to establish good cause and we would deny Dyno Nobel's motion to reopen.



Timothy J. Baker, Commissioner



Moshe Z. Marvit, Commissioner

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