

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

MAY 04 2018

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

MOUNTAIN CEMENT COMPANY,

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Docket No. WEST 2017-638-M
A.C. No. 48-00007-433214

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

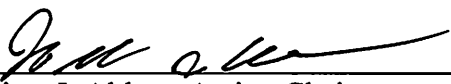
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On August 22, 2016, the Commission received from Mountain Cement Company (“Mountain Cement”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission 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).

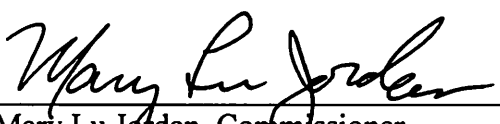
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final orders, the Commission 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).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on March 10, 2017, and became a final order of the Commission on April 10, 2017. Mountain Cement asserts that it inadvertently sent the contest form to MSHA’s St. Louis office with a check for an uncontested citation instead of to the Arlington office. Upon learning of its mistake, Mountain Cement asserts that it contacted counsel in order to seek reopening. 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.

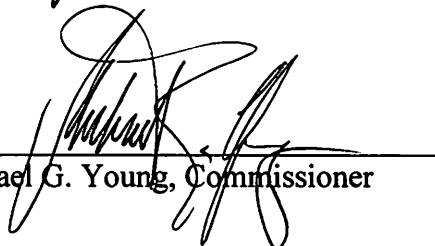
In its request to reopen, Mountain Cement includes an affidavit from its safety director stating that it learned that the citation had become final when it received a delinquency notice on May 30, 2017. The Secretary states that the delinquency notice was issued on May 24, 2017. Mountain Cement did not file its request to reopen until August 22, 2017, 90 days after the delinquency notice was sent and 84 days after it was received. Settled commission case law requires an operator to file a motion to reopen within 30 days following receipt of a delinquency notice. If the operator fails to do so, it must provide a satisfactory explanation for the delay. *See Concrete Mobility, LLC*, 37 FMSHRC 1709, 1710 (Aug. 2015); *Lone Mountain Processing, Inc.*, 33 FMSHRC 2373 (Oct. 2011); *Highland Mining*, 31 FMSHRC 1313, 1317 (Nov. 2009). Here, the operator has given reasons for its initial failure to timely contest the orders at issue. However, it has not provided any explanation for its failure to request reopening within 30 days of learning of its delinquency. Accordingly, we deny Mountain Cement’s motion.



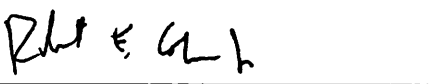
William I. Althen, Acting Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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