

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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May 22, 2019

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2018-302-M
v.	:	A.C. No. 20-00038-463276
	:	
INDUSTRIAL PROCESS EQUIPMENT	:	
CONSTRUCTORS	:	

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, 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 July 2, 2018, the Commission received from Industrial Process Equipment Constructors (“Industrial Process”) 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 April 30, 2018, and became a final order of the Commission on May 30, 2018.

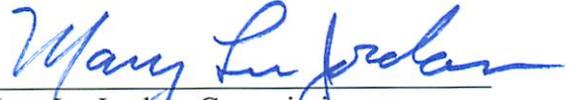
Industrial Process asserts that its failure to timely contest was the result of a typography error during informal negotiations with an MSHA representative. After MSHA issued Citation No. 8952382 to Industrial Process on March 19, 2018, Industrial Process requested an informal conference with a local MSHA representative in order to seek modifications to the cited safety standard. On May 8, 2018, the requested conference was held. As a result of the conference, changes were made to the citation. However, Industrial Process asserts that it typed the wrong citation number in the subject line of the email in which the May 8, 2018 conference was requested. Industrial Process asserts that, as a result of this typography mistake, the wrong citation was modified in MSHA records. By the time the mistake was discovered, the deadline for contesting the citation had passed. Industrial Process paid the penalty in full. Industrial Process filed a Motion to Reopen on June 29, 2018, 30 days after the Proposed Penalty Assessment became a final order of the Commission. The Secretary does not oppose the request to reopen.

Having reviewed Industrial Process's request and the Secretary's response, we find that the operator's failure to timely contest the assessment was the result of a mistake. 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.



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Marco M. Raikovich, Jr., Chairman



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Mary Lu Jordan, Commissioner



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Michael G. Young, Commissioner



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William I. Althen, Commissioner



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Arthur R. Traynor, III, Commissioner

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