FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 2, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. BLANCHARD MACHINERY CO.	Docket No. SE 2024-0113 A.C. No. 38-00612-587965

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

ORDER

BY: Jordan, Chair, and Baker, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On February 22, 2024, the Commission received from Blanchard Machinery Company ("Blanchard") 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

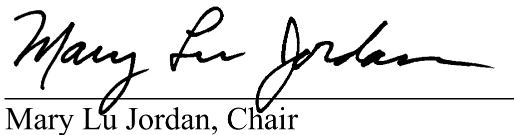
proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on November 2, 2023, and became a final order of the Commission on December 4, 2023.

Blanchard asserts that it never received the proposed assessment. The operator states that it received a delinquency notice from MSHA on January 23, 2024. On January 25, Blanchard's outside counsel obtained a copy of the proposed assessment from MSHA's Office of Assessments, and attempted to file a penalty contest the next day. However, on January 30, MSHA indicated that the contest was untimely and could not be accepted. In further investigating the matter, Blanchard discovered that the proposed assessment had been sent to the attention of Richard Trotter, whose duties do not include mining operations or safety and health, and was signed for by "M. Carey" on November 2. Blanchard has not employed anyone by that name. Blanchard contacted its third party carrier, who stated that although it once had an employee named "Mike Carey," that person had not worked for the carrier since 2022. Blanchard has updated its contact information with MSHA to include its General Counsel as a recipient for all notifications in order to ensure that this situation does not happen again.

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.

Having reviewed Blanchard's request and the Secretary's response, we find that an inadvertent mistake occurred with an unknown person signing for the assessment. *See Robinson Nevada Mining Co.*, 46 FMSHRC 661, 662 (Aug. 2024) (reopening when unknown person signed for assessment). 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

Timothy J. Baker, Commissioner

Commissioner Marvit, concurring:

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

In *Explosive Contractors*, 46 FMSHRC __, No. CENT 2024-0122 (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 __, slip op. at 3, No. WEVA 2024-0036 (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, however, votes to reopen the case. The Mine Act has not granted us authority to reconsider final orders of the Commission as I set out more fully in *Explosive Contractors*. To the contrary, it has limited our authority to do so. Therefore, I respectfully dissent and would deny reopening.

Moshe Z. Marvit, Commissioner

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