

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, D.C. 20004-1710

December 6, 2021

SECRETARY OF LABOR,	:	Docket No. WEVA 2021-0180
MINE SAFETY AND HEALTH	:	A.C. No. 46-08659-512525
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2021-0181
	:	A.C. No. 46-08659-514345
	:	
v.	:	Docket No. WEVA 2021-0182
	:	A.C. No. 46-08659-518037
	:	
LO DOWN ENERGY, INC.	:	Docket No. WEVA 2021-0183
	:	A.C. No. 46-08659-518826

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”).<sup>1</sup> On February 19, 2021, the Commission received from Lo Down Energy, Inc. (“Lo Down”) motions seeking to reopen penalty assessments that had become final orders 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

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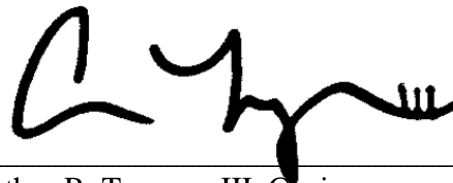
<sup>1</sup> For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers WEVA 2021-0180, WEVA 2021-0181, WEVA 2021-0182, and WEVA 2021-0183, involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

The Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicates that the proposed assessments were delivered to the operator on April 27, 2020, May 18, 2020, July 17, 2020, and August 13, 2020. The assessments became final orders of the Commission on May 27, 2020, June 17, 2020, August 16, 2020, and September 12, 2020, respectively.

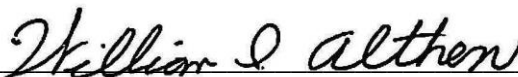
Lo Down states that due to the COVID-19 pandemic, it had changed the routing of its MSHA assessments to its accounting office. However, due to the pandemic, employees in that office had only worked in the office intermittently. The operator contends that the proposed assessments were misplaced due to its new pandemic mail-handling procedure. The operator learned of the delinquent assessments when it received notifications in the mail that penalties were past due. The Secretary does not oppose the requests to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed in accordance with MSHA’s regulations at 30 C.F.R. § 100.7 and the Commission’s procedural rules.

Having reviewed Lo Down’s request and the Secretary’s response, we find that the operator inadvertently misplaced the proposed penalty assessments. In the interest of justice, we hereby reopen these matters and remand them 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 petitions for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.



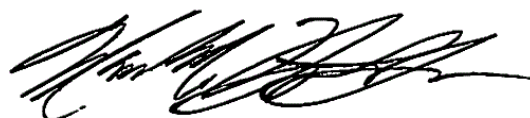
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Arthur R. Traynor, III, Chair



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William I. Althen, Commissioner



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Marco M. Rajkovich Jr., Commissioner

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