

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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WASHINGTON, DC 20004-1710

**March 22, 2023**

SECRETARY OF LABOR,	:	Docket No. SE 2022-0204
MINE SAFETY AND HEALTH	:	A.C. No. 40-03530-525097
ADMINISTRATION (MSHA),	:	
	:	Docket No. SE 2022-0205
	:	A.C. No. 40-03530-528220
	:	
v.	:	Docket No. SE 2022-0206
	:	A.C. No. 40-03530-540011
	:	
	:	Docket No. SE 2022-0207
POTTER SOUTH EAST, LLC,	:	A.C. No. 40-03530-541838
	:	
	:	Docket No. SE 2022-0208
	:	A.C. No. 40-03530-543535
	:	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, 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. (2018) (“Mine Act”).<sup>1</sup> On September 1, 2022, Potter South East, LLC, filed a motion to reopen the five captioned cases which 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) 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

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<sup>1</sup> The Commission hereby consolidates these captioned matters pursuant to Commission Procedural Rule 12, 29 C.F.R. § 2700.12.

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).

Potter filed a *pro se* motion to reopen the proceedings which simply states: “[t]he amount of the assessment penalty was a total surprise to us, as we have implemented procedures to prevent and correct every situation that may have resulted in a citation.” Mot. at 1.

The Secretary of Labor filed a motion in opposition, arguing that Potter’s motion fails to fulfill its burden to explain why it did not timely contest the penalties and to explain its delay in seeking reopening after receiving delinquency notices.<sup>2</sup> In fact, the Secretary represents that Potter only filed the motion to reopen shortly after receiving the Secretary’s scofflaw notice that it had an outstanding balance of \$51,815.26 in unpaid penalties, interest and administrative costs. Sec’y Mot. at 7 (Attachment H, August 8, 2022).

The Commission requires that, at a minimum, a motion to reopen “must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator’s knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure.”

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<sup>2</sup> The Secretary of Labor represents that a total of 62 citations and penalties are at issue in the captioned cases. Proposed Assessment Number 000525097 (SE 2022-0204) concerns 11 citations and became a final order on December 18, 2020. On February 2, 2021, MSHA sent Potter a delinquency notice for the penalties. On June 23, 2021, MSHA received payment from Potter which it applied to the citations at issue.

Proposed Assessment Number 000528220 (SE 2022-0205) concerns nine citations and became a final order on February 18, 2021. MSHA sent Potter a delinquency notice on April 6, 2021.

Proposed Assessment Number 000540011 (SE 2022-0206) concerns two citations and became a final order on October 12, 2021. MSHA sent Potter a delinquency notice on November 30, 2021.

Proposed Assessment Number 000541838 (SE 2022-0207) concerns 23 citations and became a final order on November 9, 2021. MSHA sent Potter a delinquency notice on December 28, 2021.

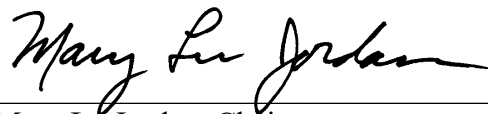
Proposed Assessment Number 000543535 (SE 2022-0208) concerns 17 citations and became a final order of the Commission on December 7, 2021. MSHA sent Potter a delinquency notice on January 25, 2022.

*Noranda Alumina, LLC*, 39 FMSHRC 441, 443 (Mar. 2017) (citing *Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010).


Potter’s terse motion is deficient as it neither alleges good cause for reopening under Rule 60(b) nor provides a factual accounting for Potter’s failure to timely contest the penalties. *See, e.g., Copenhagen Constr., Inc.*, 43 FMSHRC 113 (Mar. 2021) (denying a motion as “deficient on its face” because it did not assert a reason justifying relief pursuant to Rule 60(b)).<sup>3</sup>

Finally, with respect to the assessments associated with Docket Nos. SE 2022-0204 and SE 2022-0205, the motion to reopen was filed more than one year after the final order was entered. Under Rule 60(c)(1) of the Federal Rules of Civil Procedure, any motion for relief from a final order pursuant to Rule 60(b) must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered. *See, e.g., Carmeuse Lime & Stone*, 33 FMSHRC 1783, 1784 (Aug. 2011).

For all the aforementioned reasons, Potter’s motion is DENIED with prejudice.



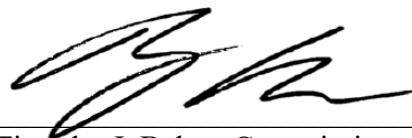
Mary Lu Jordan, Chair



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner



Timothy J. Baker, Commissioner

<sup>3</sup> Furthermore, it is well recognized that a movant’s good faith or lack thereof is an important factor in determining whether good cause exists to reopen a final order. *See, e.g., Stone Zone*, 41 FMSHRC 272, 274 (June 2019) (citations omitted). Some of the factors relevant to the good faith analysis are the number of delinquent penalties outstanding, the period of time the delinquent penalties accrued, and the seriousness of the citations underlying the aforementioned penalties. *Kentucky Fuel Corp.*, 38 FMSHRC 632, 633 (Apr. 2016); *see also Oak Grove Res. LLC*, 33 FMSHRC 1130, 1132 (June 2011).

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