

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

**April 23, 2020**

SECRETARY OF LABOR,	:	Docket No. WEST 2019-529-M
MINE SAFETY AND HEALTH	:	A.C. No. 02-00826-494853
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 2019-530-M
	:	A.C. No. 02-00826-497050
ASARCO LLC	:	

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, 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”). On September 5, 2019, the Commission received from Asarco LLC (“Asarco”) a motion seeking to reopen two 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).<sup>1</sup>

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).

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<sup>1</sup> For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers WEST 2019-529-M and WEST 2019-530-M involving similar procedural issues. 29 C.F.R. §2700.12.

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment for WEST 2019-529-M was delivered on July 16, 2019, and became a final order of the Commission on August 15, 2019. MSHA records further indicate that the proposed assessment for WEST 2019-530-M was delivered on August 12, 2019, and became a final order of the Commission on September 11, 2019.<sup>2</sup> Asarco states that it timely contested most of the citations at issue to the Commission on July 1, 2019.<sup>3</sup> The operator further asserts that, having mistakenly believed that the pendency of the contest proceedings obviated the need to respond to the proposed penalty, it failed to challenge the proposed penalty assessment. In addition, Asarco states that the employee responsible for filing contests with MSHA failed to contest four of the penalties because he was confused by the fact that MSHA had combined citations from multiple inspections in the proposed assessment in Docket No. WEST 2019-529-M. 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.

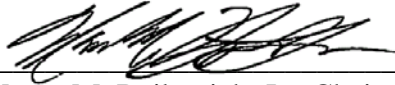
Having reviewed Asarco’s request and the Secretary’s response, we find that the operator clearly expressed its intent to contest the citations by initiating contest proceedings with the Commission and that Asarco’s failure to timely file a contest with MSHA was due to inadvertence or mistake within the meaning of Rule 60(b)(1). Moreover, Asarco took prompt action to file a motion to reopen after the citations became final orders of the Commission. 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

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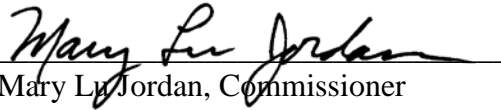
<sup>2</sup> At the time the motion to reopen was filed, the proposed assessment in WEST 2019-530-M was not yet a final order of the Commission. There is no evidence in the record that the operator attempted to remedy the situation by filing a contest of the civil penalty, even after this fact was pointed out in the Secretary’s response. As the 30-day deadline for filing a contest has now expired, we entertain Asarco’s motion to reopen as properly filed.

<sup>3</sup> These contest cases were docketed as Docket Nos. WEST 2019-388-RM; WEST 2019-389-RM; WEST 2019-390-RM; WEST 2019-391-RM; WEST 2019-392-RM; WEST 2019-393-RM; WEST 2019-394-RM; WEST 2019-395-RM; WEST 2019-396-RM; WEST 2019-397-RM; WEST 2019-398-RM; WEST 2019-399-RM; WEST 2019-400-RM; WEST 2019-401-RM; WEST 2019-402-RM; WEST 2019-403-RM; WEST 2019-404-RM; WEST 2019-405-RM; WEST 2019-406-RM; WEST 2019-407-RM; WEST 2019-408-RM; WEST 2019-409-RM; WEST 2019-410-RM; WEST 2019-411-RM; WEST 2019-412-RM; WEST 2019-417-RM; WEST 2019-418-RM; WEST 2019-419-RM; WEST 2019-420-RM; WEST 2019-421-RM; WEST 2019-422-RM; WEST 2019-423-RM; WEST 2019-424-RM; WEST 2019-425-RM; WEST 2019-426-RM; WEST 2019-427-RM; WEST 2019-428-RM; WEST 2019-429-RM; WEST 2019-430-RM; WEST 2019-431-RM; WEST 2019-432-RM; WEST 2019-433-RM; WEST 2019-434-RM; WEST 2019-435-RM; WEST 2019-436-RM; WEST 2019-437-RM; WEST 2019-438-RM; WEST 2019-439-RM; WEST 2019-440-RM; WEST 2019-441-RM; WEST 2019-442-RM; WEST 2019-443-RM; WEST 2019-444-RM; and WEST 2019-445-RM. On December 5, 2019 these cases were assigned to Judge Simonton, Judge Miller, and Judge Rae. The cases were dismissed as moot in orders issued on January 6, 2020, December 12, 2019, and February 5, 2020, respectively. Asarco did not move to reopen the aforementioned contest proceedings.

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.



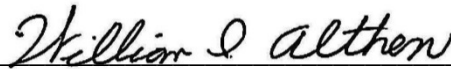
Marco M. Rajkovich, Jr., Chairman



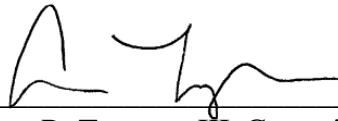
Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



William I. Althen, Commissioner



Arthur R. Traynor, III, Commissioner

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