

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 2, 2023

SECRETARY OF LABOR,	:	Docket No. PENN 2023-0011
MINE SAFETY AND HEALTH	:	A.C. No. 36-07230-559759
ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2023-0012
v.	:	A.C. No. 36-07416-559760
	:	
CONSOL PENNSYLVANIA	:	Docket No. PENN 2023-0013
COAL COMPANY, LLC	:	A.C. No. 36-10045-559765

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, 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. (2018) (“Mine Act”). On October 28, 2022, the Commission received from Consol Pennsylvania Coal Company, LLC (“Consol”) three 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).¹

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 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

¹ For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers LAKE 2023-0011, LAKE 2023-0012, and LAKE 2023-0013 because they involve similar factual and procedural issues. 29 C.F.R. § 2700.12.

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 one proposed assessment (No. 000559759) was delivered to the operator on August 6, 2022, and two proposed assessments (Nos. 000559760, 000559765) were delivered to the operator on August 8, 2022. The assessments became final orders of the Commission on September 6, 2022, and September 7, 2022, respectively.

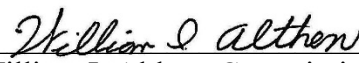
On August 29, 2022, MSHA received three partial payments from the operator related to citations that the operator chose not to contest on the three proposed assessments. Consol asserts that it also mailed its three notice of contest packets on August 15, 2022. MSHA sent Consol one delinquency notice related to Proposed Assessment No. 000559759 on October 21, 2022, and two delinquency notices related to Proposed Assessment Nos. 000559760 and 000559765 on October 24, 2022, indicating that MSHA had not received the operator's contests.

It appears that the operator's notices of contests were not mailed via certified mail or other trackable mail service. 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.

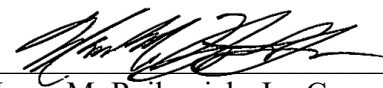
Having reviewed Consol's request and the Secretary's response, we find that the notices of contest were not timely received due to inadvertence and that the operator promptly filed motions to reopen upon receiving the delinquency notices.² In the interest of justice, we hereby reopen this matter and 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



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner



Timothy J. Baker, Commissioner

² We strongly encourage Consol to take necessary steps to ensure that future penalty contests are timely filed in accordance with the Commission's procedural rules. Similar requests to reopen untimely contests may not be favorably considered.

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