

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**May 16, 2024**

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH : Docket No. SE 2024-0022  
ADMINISTRATION (MSHA) : A.C. No. 38-00007-580575  
 :  
v. : Docket No. SE 2024-0111  
 : A.C. No. 38-00007-589084  
GIANT CEMENT COMPANY :

BEFORE: Jordan, Chair; Althen, Rajkovich, Baker, and Marvit, 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”). On October 19, 2023 and February 21, 2024, the Commission received from Giant Cement Company (“Giant”) two motions seeking to reopen penalty assessments that had become a 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

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<sup>1</sup> For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers SE 2024-0022 and SE 2024-0111 involving similar procedural issues. 29 C.F.R. § 2700.12.

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 in SE 2024-0022 was delivered on July 10, 2023, and became a final order of the Commission on August 9, 2023. Giant asserts that it timely filed the contest in this case but received a delinquency notice dated September 25, 2023 claiming that the operator was delinquent on one of the three proposed penalties at issue. The Secretary agrees that the operator timely contested the penalties but explains that the operator did so by filing two separate contest notices which confused MSHA's system. As a result, the delinquency notice was sent to Giant in error. The Secretary notes that all three citations are currently docketed at SE 2023-0224 and asks that the Commission dismiss the motion to reopen as moot to allow the proceedings before the Judge to continue.

MSHA records indicate that the proposed assessment in SE 2024-0111 was delivered on November 17, 2023, and became a final order of the Commission on December 18, 2023. Giant asserts that it timely filed its contest of the proposed assessments. However, mailing receipts filed in support of Giant's motion to reopen show that the contest was mailed to MSHA's collection office in St. Louis, Missouri, instead of MSHA's headquarters in Arlington, Virginia. 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 to the correct mailing address.

Having reviewed Giant's requests and the Secretary's responses, we conclude that the proposed penalty assessment in SE 2024-0022 did not become a final order of the Commission because the operator timely contested the proposed assessment. Section 105(a) states that if an operator "fails to notify the Secretary that he intends to contest the . . . proposed assessment of penalty . . . the citation and the proposed assessment of penalty shall be deemed a final order of the Commission." 30 U.S.C. § 815(a). Here, Giant notified the Secretary of the contest. This obviates any need to invoke Rule 60(b). Accordingly, the operator's motion to reopen is moot, and SE 2024-0022 is dismissed.

Moreover, we find that operator's failure to timely contest the proposed assessment in SE 2024-0111 was the result of Giant's mistaken mailing of the contest to the wrong MSHA address. In the interest of justice, we hereby reopen SE 2024-0111 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.



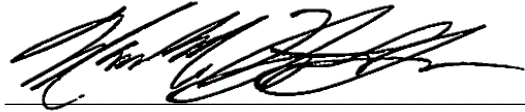
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Mary Lu Jordan, Chair



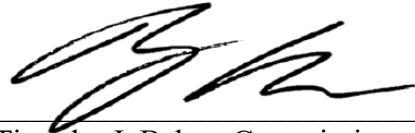
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William I. Althen, Commissioner



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Marco M. Rajkovich, Jr., Commissioner



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Timothy J. Baker, Commissioner



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Moshe Z. Marvit, Commissioner

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