

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 2, 2021

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2020-0341-M
ADMINISTRATION (MSHA)	:	A.C. No. 45-01129-511209
	:	
v.	:	Docket No. WEST 2020-0342-M
	:	A.C. No. 45-00063-511208
NASELLE ROCK AND ASPHALT	:	
COMPANY	:	

BEFORE: Traynor, Chair; Althen and Rajkovich, 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. (2012) (“Mine Act”). On July 6, 2020, the Commission received from Naselle Rock and Asphalt Company (“Naselle”) two 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).<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

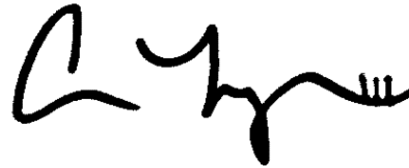
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<sup>1</sup> For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers WEST 2020-0341-M and WEST 2020-0342-M involving similar procedural issues. 29 C.F.R. § 2700.12.

proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

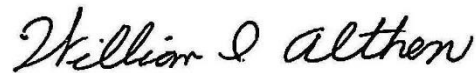
Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessments were delivered on March 23, 2020, and became final orders of the Commission on April 22, 2020. Naselle asserts that the proposed assessments were not timely contested as a result of safety precautions taken in response to the Covid-19 pandemic. Offices were shut down on March 30, 2020, and personnel did not return to work until the week of April 20. The notices of contest were mailed on April 23, 2020, one day after the proposed assessments became final orders. 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 Naselle’s request and the Secretary’s response, we find that the one-day delay in contesting the proposed assessments was excusable in light of the unusual pandemic related circumstances. 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 a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



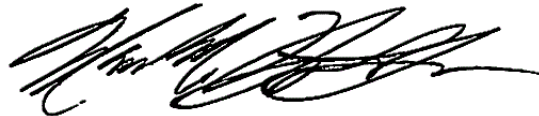
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Arthur R. Traynor III, Chair



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William I. Althen, Commissioner



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Marco M. Rajkovich, Jr., Commissioner

Distribution:

Kim Redding, Consultant  
N-Compliance Safety Services, Inc.  
[Redding1562@msn.com](mailto:Redding1562@msn.com)

John M. McCracken, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
Mine Safety and Health Division  
201 12th Street South, Suite 401  
Arlington, VA 22202-5452  
[McCracken.John.M@dol.gov](mailto:McCracken.John.M@dol.gov)

Archith Ramkumar  
Appellate Counsel  
U.S. Department of Labor  
Office of the Solicitor  
[Ramkumar.Archith@dol.gov](mailto:Ramkumar.Archith@dol.gov)

April Nelson, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
Mine Safety and Health Division  
201 12th Street South, Suite 401  
Arlington, VA 22202-5452  
[Nelson.April@dol.gov](mailto:Nelson.April@dol.gov)

Melanie Garris  
U.S. Department of Labor  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
201 12th Street South, Suite 401  
Arlington, VA 22202-5452  
[Garris.Melanie@dol.gov](mailto:Garris.Melanie@dol.gov)

Chief Administrative Law Judge Glenn Voisin  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Avenue, NW, Suite 520N  
Washington, DC 20004-1710  
[GVoisin@fmshrc.gov](mailto:GVoisin@fmshrc.gov)