

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**June 21, 2023**

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2022-0007
v.	:	A.C. No. 41-02885-539820
	:	
CEMEX CONSTRUCTION	:	
MATERIALS SOUTH, LLC	:	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

**ORDER**

BY: Jordan, Chair; Althen & Rajkovich, Commissioners:

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 12, 2021, the Commission received from Cemex Construction Materials South, LLC (“Cemex”) a motion seeking to reopen a penalty assessment that had become a final order 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 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).

MSHA records indicate that the proposed assessment was mailed via the USPS to the operator on August 10, 2021. USPS recorded the date of delivery as August 16, 2021. On September 15, 2021, the proposed assessment was deemed a final order of the Commission because the operator had not filed a Notice of Contest within 30 days.


Cemex does not dispute that the assessment was mailed to the correct address. However, the method of delivery confirmation is unclear, and the safety manager attests that he did not personally receive the assessment until September 27, 2021, after the assessment had been deemed a final order of the Commission. The Secretary of Labor does not oppose the request to reopen.

We note that the motion to reopen was timely filed. The Commission has previously held that “[m]otions to reopen received within 30 days of an operator’s receipt of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time.” *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009). Here, the motion to reopen was filed on October 12, 2021, within 30 days of the final order of September 15, 2021. Therefore, the motion to reopen was filed within a reasonable amount of time.


Having reviewed Cemex’s request and the Secretary’s response, we find that Cemex has demonstrated good cause for its failure to timely respond and acted in good faith by timely filing its request to reopen. 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

Commissioner Baker, dissenting:

I respectfully dissent.

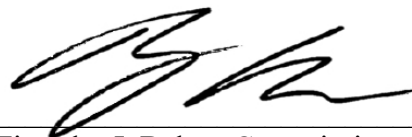
In the past, the Commission has held that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *See, e.g., Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010).

As set forth in the majority opinion, the Secretary provided USPS documentation showing Cemex received its proposed assessment on August 16, 2021. On September 15, 2021, the proposed assessment was deemed a final order of the Commission. Cemex then filed a Motion to Reopen. Cemex concedes the proposed assessment was delivered to the correct address but alleges that it has no record of the delivery. The safety manager further concedes that he eventually received a copy of the assessment, albeit only after it had already been deemed a final order of the Commission. In short, after delivery, the assessment was not timely routed to the person at Cemex responsible for its processing. Cemex provides no explanation for their failure.

Commission Procedural Rule 25, 29 C.F.R. § 2700.25, provides that “[t]he Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of the violation alleged, the amount of the proposed penalty assessment, and that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty assessment.”

The USPS receipts show Cemex, as an entity, received the assessments. Therefore, the Secretary delivered the assessments as required pursuant to Commission Procedural Rule 25. Once Cemex received the assessment, it was responsible for ensuring that it was reviewed by the appropriate personnel and processed in a timely manner. Its failure to do so demonstrates an inadequate or unreliable internal processing system.

Therefore, I would find that Cemex failed to establish good cause and deny Cemex’s motion to reopen.



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Timothy J. Baker, Commissioner

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