

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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WASHINGTON, DC 20004-1710

**July 11, 2023**

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2023-0014
v.	:	A.C. No. 38-00010-561545
	:	
VULCAN ELECTRICAL SERVICES	:	

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 21, 2022, the Commission received from Vulcan Electrical Services (“Vulcan”) 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).

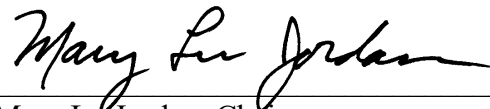
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of 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).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on August 29, 2022, and became a final order of the Commission on September 28, 2022.

Vulcan explains that a new administrative assistant received the proposed penalty assessment but did not understand the significance of the timing for filing a contest. Consequently, the assistant did not forward the proposed penalty assessment to the Director of Safety until October 20, 2022. Vulcan provided training regarding the 30-day contest period to the administrative assistant to ensure that future contests are timely. The operator filed the motion to reopen one day after the error was discovered. 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 in accordance with MSHA’s regulations at 30 C.F.R. § 100.7 and the Commission’s procedural rules.

Having reviewed Vulcan’s request and the Secretary’s response, and in light of the operator’s prompt filing of a motion to reopen and the operator’s actions to correct the issue, we find that the delay in filing the penalty contest was the result of inadvertence and excusable neglect. 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.



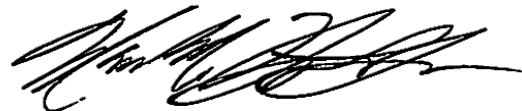
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Mary Lu Jordan, Chair



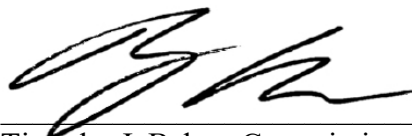
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William I. Althen, Commissioner



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Marco M. Rajkovich, Jr., Commissioner



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Timothy J. Baker, Commissioner

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