

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 22, 2022

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. CENT 2022-0184
ADMINISTRATION (MSHA)	:	A.C. No. 14-01622-550894
	:	
v.	:	
	:	
BOB BERGKAMP CONSTRUCTION	:	
COMPANY, INC.	:	

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. (2018) (“Mine Act”). On June 23, 2022, Bob Bergkamp Construction Company, Inc., filed a motion 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).

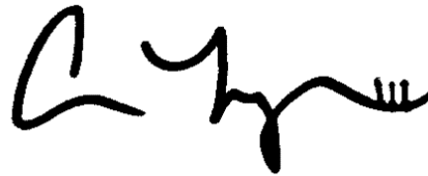
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

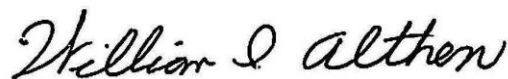
The Secretary of Labor states that the records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that a proposed assessment was sent to the operator on March 8, 2022, and was delivered on March 21, 2022, via U.S. Postal Service Mail. The Secretary asserts that the proposed assessment became a final order of the Commission on April 20, 2022, 30 days after its delivery. The Secretary further asserts that MSHA issued a delinquency notice to the operator on June 6, 2022.

Bob Bergkamp maintains that it attempted to timely file a contest of the proposed penalties but mistakenly filed the notice with the Commission rather than with MSHA. The operator attached a confirmation email from the Commission verifying it uploaded a document to the Commission’s electronic case management system on March 29, 2022. The Secretary does not oppose the operator’s request to reopen.

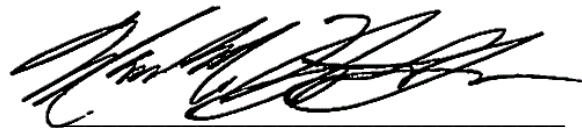
Having reviewed Bob Bergkamp’s request and the Secretary’s response, we find that the operator demonstrated that it failed to timely file because of a mistake. We hereby reopen this matter, and remand the case to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and 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.



Arthur R. Traynor, III, Chair



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner

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