

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

August 22, 2022

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2021-0259
v.	:	A.C. No. 46-09207-527987
	:	
Harman Branch Mining Inc.	:	

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

**ORDER**

BY THE COMMISSION:

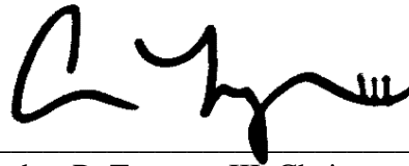
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On April 9, 2021, the Commission received from Harman Branch Mining Company (“Harman”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission 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 January 11, 2021, and became a final order of the Commission on February 10, 2021. Harman asserts that its representative prepared a notice of contest and placed it in the U.S. mail for delivery on January 12, 2021 and attributes any resulting error to the pandemic causing an unprecedented change in how businesses operate, including MSHA and the U.S. Mail. 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 Harman’s request and the Secretary’s response, we find that excusable neglect, possibly resulting in part from changes necessitated by the pandemic in that Harman’s representative contends he timely mailed the notice of contest and that subsequent delay in processing the document was likely the result of the pandemic. Furthermore, after learning of the delinquency, the operator did not unduly delay in filing its motion 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.



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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:

Emily Toler-Scott, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 401  
Arlington, VA 22202-5450  
[Scott.Emily.T@dol.gov](mailto:Scott.Emily.T@dol.gov)

April Nelson, Esq.  
Associate Solicitor,  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 401  
Arlington, VA 22202-5450  
[Nelson.April@dol.gov](mailto:Nelson.April@dol.gov)

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

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 401  
Arlington, VA 22202-5450  
[Garris.Melanie@dol.gov](mailto:Garris.Melanie@dol.gov)

James Bowman  
P.O. Box 99  
Midway, WV 25878  
[Jimbowman61@hotmail.com](mailto:Jimbowman61@hotmail.com)