

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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WASHINGTON, DC 20004-1710

**September 20, 2023**

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 : Docket No. CENT 2023-0190  
v. : A.C. No. 23-02543-570964  
 :  
MULBERRY LIMESTONE QUARRY :  
CO., INC :

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 May 16, 2023, the Commission received from Mulberry Limestone Quarry, Co.. Inc. (“Mulberry”) 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 February 13, 2023 and became a final order of the Commission on March 15, 2023. MSHA received partial payment of the assessment on March 14, 2023, a day before the assessment became a final order of the Commission. A delinquency notification was mailed to the operator on May 1, 2023, and delivered on May 8, 2023. The Secretary does not oppose the request to reopen.

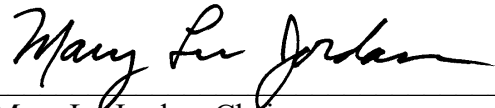
Payments for uncontested citations must be mailed to MSHA’s Lock Box in St. Louis, Missouri. However, contests of proposed assessments must be mailed to a different MSHA address in Arlington, Virginia. On March 10, 2023, Mulberry correctly mailed its payment of the uncontested citations to St. Louis. However, Mulberry mistakenly mailed its contest along with its payment to the St. Louis address.<sup>1</sup> Mulberry did not become aware of its failure to timely contest the assessment until it received a delinquency notice on May 8, 2023. Upon receiving the delinquency notice, Mulberry promptly contacted MSHA, who informed them of their mistake.

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 May 16, 2023, within 30 days of the receipt of the delinquency notification on May 8, 2023. Therefore, the motion to reopen was filed within a reasonable amount of time.

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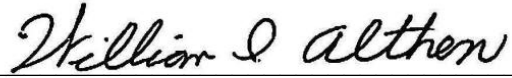
<sup>1</sup> In its motion to reopen, Mulberry implies that the same envelope which contained the check for the uncontested citations also included the form indicating that Mulberry wished to contest a portion of the assessment. Mulberry also asserts that MSHA was able to locate the contest of the assessment, but determined that the contest had been received at the St. Louis, Missouri address.

Having reviewed Mulberry's request and the Secretary's response, we find that Mulberry 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.



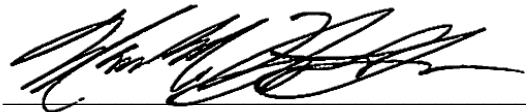
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Mary Lu Jordan, Chair



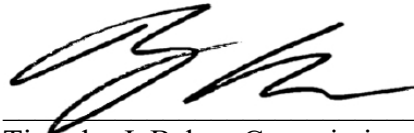
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William I. Althen, Commissioner



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Marco M. Rajkovich, Jr., Commissioner



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Timothy J. Baker, Commissioner

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