

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

**September 28, 2021**

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. LAKE 2020-0014-M
	:	A.C. No. 21-03404-493313
v.	:	
	:	
UNITED TACONITE, LLC	:	

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 October 29, 2019, the Commission received from United Taconite, LLC (“United Taconite”) a request 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”); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). 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 will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

The proposed assessment was delivered to the operator on June 17, 2019 and became a final order on July 17, 2019. The total penalty for all the violations in the assessment was \$27,380.<sup>1</sup>

The operator primarily seeks to reopen this matter on the basis that the employee who received the proposed assessment failed to deliver it to Bryan Baird, the safety director in charge of handling proposed assessments. The operator claims that Baird did not become aware of the proposed assessment until July 19, 2019, two days after the proposed assessment had become a final order. The operator mailed a contest notice later the same day for four citations: Citation Nos. 9385814, 9385817, 9385818 and 9385819. The contest notice was received by MSHA on July 22, five days after the proposed assessment had become a final order.<sup>2</sup>

MSHA sent a letter dated July 29, 2019 informing the operator that its contest was late and that the proposed assessment had become a final order. The letter was sent to the address of the operator's counsel. However, the operator's counsel allegedly moved to a new office in July 2019 and therefore claims not to have received the mailed letter. It is unclear why the mailed letter was not forwarded to counsel's new address.

Subsequently, on August 14, 2019, MSHA deposited the operator's check of \$10,775. MSHA applied part of this check to Citation Nos. 9385817 and 9385819, which had been listed in the operator's untimely contest, while the remainder of the check was applied to Citation No. 9385812. In an email, the operator claimed that MSHA incorrectly applied this payment to the wrong citations. The operator maintains that the payment of \$10,775 was intended to be applied to the remainder of the penalty assessment besides the citations listed in its contest (the remainder of the assessment was \$10,775).

On September 12, 2019, the operator received a delinquency notice, dated September 3, and the operator's counsel immediately contacted MSHA. On that same day, MSHA sent the operator's counsel a copy of the July 29 letter via email. As set forth above, the operator's counsel claims that it became aware of the letter only after receiving the emailed copy on September 12.

The operator also claims that MSHA erred in determining that its contest was late. 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, and if the operator fails to do so, the proposed assessment becomes a final order of the Commission. 30 U.S.C. § 815(a). Despite this, the operator claims that 29 C.F.R. § 2700.8(b) extends the deadline for filing contests by five days when MSHA serves an assessment by a method of delivery other than same day service.

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<sup>1</sup> The operator's motion to reopen erroneously states that the proposed assessment was delivered on July 17, 2019, and erroneously lists the total penalty for the proposed assessment as \$24,917.

<sup>2</sup> The total penalty for the four citations listed in the contest was \$16,605. The total penalty for the remaining violations in the proposed assessment was \$10,775 (27,380 - 16,605 = 10,775).

However, the Commission has conclusively rejected the argument that 29 C.F.R. § 2700.8(b) applies to contests of proposed assessments. *Bucyrus Field Svcs. Inc.*, 31 FMSHRC 1029, 1030 at n.1 (Sept. 2009). Therefore, it is unnecessary to further consider this issue.

In this case, we must consider whether the operator demonstrated that it acted in good faith, and whether the Secretary opposes the motion or alleges that the operator acted in bad faith. *Noranda Alumina, LLC*, 39 FMSHRC 441, 444 (Mar. 2017). Here, the operator's good faith intent to timely contest the penalty is demonstrated by the fact that its contest was mailed on July 19, just two days after the assessment became a final order. Moreover, the Secretary does not oppose the motion or allege that the operator acted in bad faith.

Having reviewed United Taconite's request and the Secretary's response, we conclude that, in the interest of justice, the part of the assessment relating to Citation Nos. 9385814, 9385817, 9385818 and 9385819 should be reopened. The remainder of the assessment will remain as a final order. Accordingly, this case is remanded 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.



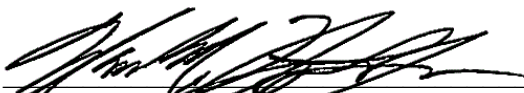
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Arthur R. Traynor, I, Chair



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William I. Althen, Commissioner



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Marco M. Rajkovich, Jr., Commissioner

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