



copy of the contest form indicating that it wishes to contest all 16 proposed penalties. The Secretary of Labor states that she does not object to reopening the assessments. Her response does not address the operator's allegation that MSHA failed to provide it a copy of Assessment No. 000167823 for over three months.

The operator also wishes to contest Assessment No. 000170304, issued on December 9, 2008, which proposes a single penalty for a previously issued order. The Secretary states that Assessment No. 000170734 was delivered to Rock N Road on December 18, 2008, and that the operator's contest was not mailed until January 21, 2009, which was four days late. The operator indicates that it was confused when, after contacting MSHA about not receiving Assessment No. 000167823 and waiting for a copy of this assessment, it then received another, different assessment.

We have held 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

Having reviewed Rock N Road's request and the Secretary's response, we conclude that Assessment No. 000167823 has not become a final order of the Commission. The operator first received the assessment by fax on February 24, 2009, and one day later filed its request to reopen. In its request it specified the individual penalties that it wishes to contest, and thus the motion may serve as the operator's timely notice of contest. *See Double Bonus Coal Co.*, 31 FMSHRC 358, 360 (Mar. 2009) (holding that statements in motions to reopen could serve as operator's notice of contest, and denying the motions as moot). Consequently, because the assessment never became a final order, reopening is not necessary. Accordingly, we deny the operator's request as to that assessment as moot and remand this matter to the Chief Administrative Law Judge for further proceedings as appropriate, pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

In the interest of the efficient administration of justice, we also reopen Assessment No. 000170734 and remand it to the Chief Administrative Law Judge for further proceedings. The operator's justifiable confusion constitutes inadvertence for contesting this assessment four days late.

Consequently, and consistent with Rule 28, the Secretary shall file petitions for assessment of penalty in both of these dockets within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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