

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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October 23, 2020

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 : Docket No. CENT 2020-0105-M  
v. : A.C. No. 42-02633-501717  
 :  
VICTORY ROCK TEXAS, LLC :

BEFORE: Rajkovich, Chairman; Althen and Traynor, 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. (2012) (“Mine Act”). On March 23, 2020, the Commission received from Victory Rock Texas, LLC, (“Victory Rock”) 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).<sup>1</sup>

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

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<sup>1</sup> The motion is dated February 4, but the Commission’s Docket Office did not receive it until March 23, 2020. There is no explanation for the discrepancy. We take note of the fact that the motion was prepared and filed at about the time the pandemic began to emerge as a generally disruptive force.

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 October 15, 2019, and became a final order of the Commission on November 15, 2019. Victory Rock's motion says that the proposed assessment in this matter was delivered while it was awaiting word from MSHA about a requested conference of the citations. Victory Rock claims that it returned its notice of contest "quickly," but has provided no proof of mailing or delivery.

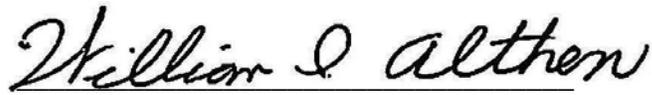
MSHA sent the operator a delinquency notice on December 30, 2019. On January 9, 2020, the operator contacted MSHA to question the status of its contest. The operator says it was told that MSHA had not received a notice of contest, and that MSHA advised it to file a motion to reopen. The Secretary does not oppose the requests to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Victory Rock's requests and the Secretary's responses, we find that the operator has sufficiently explained its failure to timely contest the citations at issue as the result of inadvertence, mistake, and excusable neglect. This is a pro se operator with no history of defaults or motions to reopen in the past 24 months. The operator's motion was not filed with the Commission until March 23 – more than 30 days after the operator says it learned from MSHA that no contest had been filed. However, the motion is dated February 4. While the discrepancy is unexplained, there is no indication of bad faith on the operator's part, and the Secretary does not oppose reopening or dispute the facts asserted in the operator's motion. While we excuse this pro se operator's failure to explain why the motion was not filed within 30 days of discovery of its default in this case, the operator must ensure that future motions to reopen are filed promptly, or that the failure to do so is adequately explained.

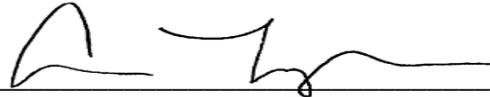
In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



Marco M. Rajkovich, Jr., Chairman



William I. Althen, Commissioner



Arthur R. Traynor, III, Commissioner

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