August 2022

TABLE OF CONTENTS

COMMISSION DECISIONS

COMMISSION ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

Review Was Granted In The Following Cases During The Month of August 2022

Secretary of Labor v. County Line Stone Co., Inc., et al.,
Docket Nos. YORK 2022-0003 et al. (PIR Judge Young, 6/28/2022)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

August 24, 2022

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. PEABODY MIDWEST MINING, LLC	Docket Nos. LAKE 2019-0023 LAKE 2019-0122
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. MICHAEL BUTLER, employed by PEABODY MIDWEST MINING, LLC	Docket No. LAKE 2019-0361

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Act" or "Mine Act"). It involves two orders issued to Peabody Midwest Mining, LLC ("Peabody") and two personal liability assessments issued to Peabody employee Michael Butler.[1] All four issuances arise from a methane event at Peabody's Francisco Mine.

Order Nos. 9106663 and 9106664 allege that a drill team continued to operate energized equipment after 5% methane was detected, in violation of requirements to de-energize equipment and stop prohibited work if at least 1.5% methane is present. 30 C.F.R. §§ 75.323(c)(2)(ii), (iii). Both were issued as significant and substantial ("S&S") and the result of an unwarrantable

[1] A third order involving a violation of the examination requirements at 30 C.F.R. § 75.512-2 has not been appealed.

failure.[2] Based on the same conduct, the Secretary of Labor also issued two personal liability assessments against Mr. Butler, the mine manager and shift supervisor during the event, pursuant to section 110(c) of the Act.[3] The Administrative Law Judge affirmed both orders including the S&S and unwarrantability findings, and both personal liability assessments. 44 FMSHRC 377 (May 2022) (ALJ) (previously unpublished decision initially issued on May 28, 2021).

On appeal, Peabody challenges the finding of a violation for Order No. 9106664 on grounds that the work undertaken by the drill team was not prohibited under the terms of the standard. Respondents also challenge the unwarrantability determinations for both orders and both findings of personal liability. For the reasons below, we affirm the Judge's decision.

I.

Factual and Procedural Background

A. Factual Background

In July 2018, Peabody contracted with REI Drilling to perform horizontal longhole drilling in the return "0" entry for Unit 3, in order to identify old works, or previously mined areas, that might be intersected when the continuous mining machine advanced. Jt. Stip. 19. This was the fourth time such drilling had been conducted at Francisco mine, with no old works previously encountered. Jt. Stip. 21-22. During the relevant quarter, Francisco Mine liberated more than 1.7 million cubic feet of methane in a 24-hour period and was on a 5-day ventilation spot inspection.[4] Jt. Stip. 31-32.

REI driller Robert Ferrin and Peabody hourly employee John Stevens arrived at the drill site at approximately 9:00 p.m. on July 22. Jt. Stip. 25. About five hours later, at 1:49 a.m. on July 23, the drill hit a void and air began to exit the bore hole at significant pressure. Jt. Stip. 26. Stevens testified that his personal multi-gas detector ("spotter") showed elevated methane levels

[2] The S&S and unwarrantable failure terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard" and establishes more severe sanctions for any violation caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." 30 U.S.C. § 814(d)(1).

[3] If a corporate operator has violated a mandatory standard, section 110(c) of the Act provides for the imposition of penalties for "any director, officer, or agent of such corporation who knowingly authorized, ordered or carried out such violation." 30 U.S.C. § 820(c).

[4] Pursuant to section 103(i) of the Act, if the Secretary finds that a mine liberates more than one million cubic feet of methane in a 24-hour period, an authorized representative of the Secretary "shall provide a minimum of one spot inspection . . . of all or part of such mine during every five working days at irregular intervals." 30 U.S.C. § 813(i).

moments after the drill hit the void.[5] Tr. 253-55. Stevens immediately phoned the tracker and asked him to contact mine manager Michael Butler, who was on Unit 3. Jt. Stip. 27; Tr. 252-54.

After Stevens returned from the phone, Ferrin directed Stevens to engage a blowout preventer ("BOP") to seal the hole. However, the pressure buildup was so great that methane began seeping out of the rib. Ferrin was concerned that closing the BOP would blow out the drill casing and they would lose control over the escaping gas, so he directed Stevens to open the BOP back up. Ferrin decided that they would instead attempt to seal the borehole by pulling out the drill rods and installing a plug ("packer") into the hole. Tr. 60-63, 252-54. Unlike the BOP, this process required the drill to be energized. Tr. 51.

The tracker contacted Butler at approximately 1:50 a.m. and stated that he was needed at the drill site. Tr. 376-7. Butler and maintenance foreman Bradley Cary arrived at approximately 1:53 a.m., at which point Ferrin and Stevens had already started pulling drill rods. Tr. 99, 335, 339, 377. Stevens met Butler by the tender[6] and informed him that they had hit old works. Tr. 336. As Butler approached the drill to speak with Ferrin, Butler's spotter went over range ("OR") indicating the presence of at least 5% methane. Tr. 256, 337-38. Butler asked Ferrin about the normal procedure after breaching old works, as Butler did not have relevant experience with this type of drilling operation. Ferrin stated that the normal response was to pull the drill rods and seal the hole. Butler agreed to the plan, let them continue, and went to call the tracker. Tr. 38-39, 51-52, 56-57, 336, 339-40.

Butler then directed Cary to return to Unit 3 to kill power to the equipment and prepare to evacuate, with specific instructions not to kill power to the drill. Tr. 278, 290-92, 340, 375. Cary returned to Unit 3 and enlisted the aid of production supervisor James Ford in shutting down the equipment and preparing for evacuation. Tr. 278, 317. Evacuation of Unit 3 began at approximately 1:57 a.m. Tr. 377. While Cary remained at Unit 3, Ford then headed to the drill site, where Butler instructed him to find some curtains and improve ventilation over the drill. Tr. 317-18, 344. At approximately 2:22 a.m., Ford went back to the unit to get curtains. Tr. 322. He then placed a curtain by the man door at crosscut 66 to push air into the 0 entry and a curtain at crosscut 67 to put intake air across the drill. Tr. 318-21.

While Cary and Ford were traveling back and forth from Unit 3, Stevens and Ferrin continued pulling drill rods. The drill had a methane detector which would shut down power to the drill ("kick") if methane levels reached 2%. The drill kicked and then restarted two to three times over the relevant period, indicating that methane levels were fluctuating above and below

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[5] All individuals present during this event were wearing personal detectors ("spotters") set to indicate "over range" ("OR") at 5.1% methane. Tr. 86, 183. Once the spotter had an OR reading, it would have to be cleared (turned off) before it could get an accurate reading again. Tr. 254-55, 261-62, 390.

[6] The tender is a hydraulic pump with an electric motor that runs the drill. Tr. 445-46. The tender is located approximately 10 feet from the drill. Tr. 360-61. Butler and Stevens testified that OR readings only happened next to or downwind from the drill, as opposed to the area near the tender. Tr. 256, 341, 351.

2%. Tr. 43-44, 70, 101, 119-20, 182, 260-64, 378-79. The record also establishes that Butler, Stevens and Ferrin's personal spotters each went over range at least twice during the relevant period, though the exact timing is unclear. *See* Tr. 118-19, 253-55, 371-72; Gov. Exs. 9(b), 9(c) (readouts of methane levels).

Meanwhile, general manager Brad Rigsby had been contacted by the tracking office and informed of the breach and the methane. Tr. 399-401. He instructed the tracker to have Unit 3 cease operations and pull the miners out. Rigsby then made a call to the District Manager for the Department of Labor's Mine Safety and Health Administration ("MSHA"), who told him that he needed to evacuate. Rigsby first interpreted this as an instruction to evacuate Unit 3 but later clarified that the District Manager had meant evacuation of the entire mine. Tr. 401-02. Rigsby headed to the mine, where he spoke to Butler (by phone) and learned that the drill team had been pulling rods and was about to insert the packer plug. Rigsby ordered Butler to stop, shut everything down, "let it bleed," i.e., let the methane dissipate, and bring everyone out of the unit. Tr. 404-05, 415.

Butler informed Ferrin and Stevens that they were to stop their work and prepare to evacuate. Tr. 258, 282-83, 350-53. At this point, Ferrin and Stevens had finished pulling the drill rods and were about to start pushing the packer into the casing. Tr. 73-74, 257, 350, 381. It appears that approximately half an hour passed between Butler's arrival at the drill site and Rigsby's evacuation order, and Ferrin and Stevens were pulling drill rods for a significant portion of this time. *See* Tr. 102, 216, 377-78.

Butler directed Cary to go shut down power to the drill, which he did with the assistance of mechanic Jesse Mitchell.[7] Tr. 280-83, 350-53. Butler, Stevens, Ferrin, Cary, Mitchell and Ford (who had just finished placing curtains) then left together at approximately 3:11 a.m. Tr. 105-06, 293; Gov. Ex. 8, at 2. Cary put a lock on the substation once he reached the surface. The borehole was eventually sealed on July 24. Jt. Stip. 28.

MSHA Inspector Keith Duncan was assigned as the accident investigator on July 26. After conducting interviews and collecting data from the spotters, he issued the relevant orders on August 16, 2018. Gov. Ex. 2-3; Tr. 83, 87-89. MSHA Special Investigator Phillip Stanley subsequently notified Butler of section 110(c) personal assessments based on the same underlying conduct.

B. Judge's Decision

The Judge found that Peabody violated sections 75.323(c)(2)(ii) and (iii) because the drill remained energized and miners continued to pull drill rods for at least half an hour despite the presence of methane levels in excess of 1.5%. 44 FMSHRC at 383, 389-90. With regard to Order No. 9106664, he found that removing the drill rods was remedial action meant to address the methane source and was therefore prohibited "other work." *Id.* at 390.

[7] The record is inconsistent as to how many trips Cary made to the drill site in total. Butler's testimony suggests three (Tr. 347, 375-76) while Cary's testimony indicates only two (Tr. 280-84).

The Judge affirmed the S&S designation for both orders, reasoning that the combination of high methane levels, an energized drill, and the presence of miners was reasonably likely to result in an explosion and serious injury. *Id.* at 384, 390-91. He also affirmed the high negligence and unwarrantable failure designations for both orders. Conceding that the drill team worked in good faith to address a dangerous condition, he nevertheless found that the violations were obvious, known and highly dangerous, and of an extent and duration sufficient to support an unwarrantability finding. *Id.* at 385-88, 391.

Finally, the Judge found Butler personally liable for the operator's violations of sections 75.323(c)(2)(ii) and (iii). He explained that Butler was aware of at least two OR readings and had authority to shut down the drill and evacuate miners, but instead oversaw the continued operation of the energized drill for at least half an hour. Accordingly, he found that Butler was an agent of the operator who knew of the violative conditions and was in a position to remedy the situation but failed to act. *Id.* at 392.

Balancing findings of high gravity and negligence against Peabody and Butler's efforts to swiftly abate the methane hazard, the Judge assessed $38,000 per order to Peabody, and $3,000 per assessment to Butler. *Id.* at 396.

C. Arguments on Appeal

Peabody concedes that it failed to de-energize in violation of section 75.323(c)(2)(ii) (Order No. 9106663) but challenges the Judge's finding that the miners were engaged in work that was prohibited under section 75.323(c)(2)(iii) (Order No. 9106664). Peabody claims the Judge's interpretation of "other work" was overly restrictive, and section 75.323(c)(2) should be read to allow ventilation control and other work intended to manage methane. As Ferrin and Stevens were working to prevent methane from escaping, Peabody states there was no violation. P. Br. at 12-18. The Secretary counters that the standard prohibits anything other than work necessary to deenergize equipment or withdraw miners, and explicitly prohibits work with energized equipment. S. Br. at 18-20.

Peabody also challenges the Judge's findings of unwarrantable failure for both orders. Peabody takes issue with the Judge's findings on the extent, duration, and degree of danger associated with the violations. P. Br. at 20-29. Peabody also contends more generally that the Judge failed to give sufficient weight to Butler's good faith belief that he was acting appropriately and in the interests of safety. *Id.* at 20-21. The Secretary counters that any good faith belief was unreasonable in this instance. S. Br. at 27.

Finally, Respondents claim that Butler's conduct did not meet the level of culpability required for personal liability because Butler reasonably believed the cited conduct was safe. P. Br. at 29-33. Alternatively, Peabody claims Butler was trying to address the methane hazard and therefore did not fail to act to correct the condition. *Id.* at 31. The Secretary reiterates that any good faith belief in the safety of such conduct was not reasonable. S. Br. at 31-32.

II.

Disposition

As discussed below, we affirm the finding of a violation for Order No. 9106664 on narrow grounds, concluding that the specific energized work undertaken by the miners was plainly prohibited by the cited standard. We also find the Judge's unwarrantable failure and personal liability determinations are supported by substantial evidence.[8] Finally, we reject Respondents' argument that culpability should not attach due to Butler's reasonable and good faith belief that the cited conduct was in the interests of miner safety, because we find the belief was not reasonable in this instance.

A. The Finding of a Violation for Order No. 9106664 is Affirmed

Order No. 9106664 alleges a violation of section 75.323(c)(2)(iii), which prohibits "other work" when methane levels exceed 1.5%. Section 75.323(c)(2) provides that, when 1.5% or more methane is present in a return air split:

> (i) Everyone except those persons referred to in § 104(c) of the Act shall be withdrawn from the affected area;
> (ii) Other than intrinsically safe AMS, equipment in the affected area shall be deenergized, electric power shall be disconnected at the power source, and other mechanized equipment shall be shut off; *and*
> (iii) No other work shall be permitted in the affected area until the methane concentration in the return air is less than 1.0 percent.

30 C.F.R. § 75.323(c)(2) (emphasis added).

The basic facts relevant to this determination are straightforward and effectively undisputed: In an area where methane levels were fluctuating above 1.5%, miners were engaged in efforts to reduce methane levels by pulling drill rods with an energized drill.[9] *See, e.g.*, Tr. 42-44, 51, 70, 74, 101-02, 182, 253-55, 260-64, 338-39, 371-72. Work occurred where more than 1.5% methane was present. Accordingly, this matter turns on the legal question of whether the

[8] When reviewing a judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[9] Peabody has not contested the violation for Order No. 9106663, i.e., that the drill was energized when more than 1.5% methane was present. Peabody does not claim that no work was occurring in the presence of elevated methane, only that it was not prohibited "other work." *See* P. Br. at 3-5, 14-18.

work was prohibited by the standard. The definition of "other work" for purposes of section 75.323(c)(2)(iii) is a matter of first impression. For the reasons below, we find this work—using an energized drill to remove drill rods—was prohibited.

The "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Dynamic Energy Inc.*, 32 FMSHRC 1168, 1171 (Sept. 2010).

We find the plain language of the safety standard unambiguously prohibits the specific conduct at issue. Section 75.323(c)(2) has three requirements: operators must (i) withdraw miners from the affected area, (ii) deenergize equipment and disconnect power sources, and (iii) permit no other work until methane levels drop. Critically, the "and" clarifies that operators must comply with all three paragraphs. The plain language of the standard prohibits energized work, and the miners were using an energized drill. Therefore, Ferrin and Stevens' efforts with the drill constituted "other work" prohibited by the standard.

While the language of the standard speaks for itself, we note that the preamble to the final rule for section 75.323 also supports reading the three paragraphs in concert. The preamble states that "other work" in paragraph (b)(1)(i) should be "considered in context of the preceding requirement in paragraph (ii)." 61 Fed. Reg. 9764, 9778 (March 11, 1996). In other words, "other work" should be interpreted within the context of the other paragraphs within the subsection. "Other work" in paragraph (c)(2)(iii) should be interpreted consistent with the requirement in paragraph (c)(2)(ii) that equipment be deenergized.

Interpreting section 75.323(c)(2) to prohibit energized work is consistent with the intent of the standard as well as the plain language. The preamble clearly articulates and emphasizes the ignition hazard posed by allowing energized equipment in a high-methane environment. In discussing subsection (b)(2), the preamble explains that requiring power to be disconnected at the power source "prevents accidental energization of equipment and removes power from cables and circuits which may also be ignition sources." *Id.* Similarly, the preamble rejected a suggestion that certain equipment be permitted to run on battery power, stating that any benefits "would not outweigh the potential ignition hazard" and such a course "would be a departure from accepted, effective, and long-standing safety practice." *Id*. The standard does envision *some* work, as it "permit[s] appropriate actions to be taken . . . *in order to prevent an explosion*." *Id.* at 9777 (emphasis added). However, actions which *increase* the likelihood of an explosion by introducing a possible ignition source clearly would not be "appropriate" under this framework. The standard is not intended to permit energized work.

The Judge and the parties reach differing conclusions as to the full scope of "work" permitted by section 75.323(c)(2). The Secretary takes the narrowest approach, arguing that the standard only permits those tasks explicitly listed in the surrounding subsections, i.e., work related to evacuation or de-energizing. The Judge defines permissible work more broadly, looking to the preamble to conclude that ventilation work is permitted but remedial work to correct the underlying methane hazard is not. 44 FMSHRC at 390. Peabody's definition is

broader still, arguing that the standard implicitly allows for both ventilation work and other forms of methane control.[10]

For purposes of this decision, it is unnecessary to fully define the categories of work permitted by the standard or address the reasonableness of the parties' definitions.[11] Irrespective of whether the standard permits ventilation work or other forms of methane control, the work *cannot* conflict with the plainly stated requirement in subsection (c)(2)(ii) that all equipment be de-energized. Because Ferrin and Stevens were engaged in work with an energized drill, that work was not permissible. We affirm Judge's finding of a violation on different grounds.

As a final matter, Peabody suggests there should be no violation where compliance is less safe than non-compliance, and that allowing the drill team to continue attempting to plug the methane leak was safer than de-energizing and stopping work. P. Br. at 17 n.4, 18. The Commission has long held that diminution of safety may not be raised as a defense in an enforcement proceeding unless the operator has first petitioned for modification of the relevant safety standard.[12] *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2130 (Nov. 1989). No such petition has been filed here. Insofar as Peabody is raising a "diminution of safety" defense, it is rejected.

B. The Unwarrantable Failure Determinations for Both Orders are Affirmed

The Commission has determined that unwarrantable failure means aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at the facts and circumstances of each case to see if any aggravating factors exist, such as the operator's knowledge of the existence of the violation, whether the violation was obvious, whether the violation posed a high degree of danger, the extent of the violative condition, the length of time that the violative condition has existed, the operator's efforts in abating the violative condition, and whether the operator has been placed on notice that greater efforts are necessary for compliance. *See Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009).

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[10] Section 75.323(c)(2)(i) references section 104(c) of the Mine Act, which exempts from evacuation requirements "any person whose presence in such area is necessary . . . to eliminate the condition described in the order." 30 U.S.C. § 814(c).

[11] We note, however, that Inspector Duncan's understanding of permissible work differs from the Secretary's litigation position. He testified that ventilation control is permitted so long as it does not involve the use of powered equipment. Tr. 127, 148-49.

[12] Section 101(c) of the Act states that, upon petition by an operator, the Secretary may modify a mandatory safety standard if "application of such standard to such mine will result in a diminution of safety to the miners." 30 U.S.C. § 811(c). An operator may raise this affirmative defense without a modification petition *if* it can show that a modification proceeding would have been inappropriate. *Westmoreland Coal Co.*, 7 FMSHRC 1338, 1341 (Sept. 1985). Here, Peabody's statement that the modification process is lengthy and "has no application here" (P. Reply Br. at 13) is insufficient to establish the impropriety of the more traditional route.

The Judge affirmed the unwarrantable failure designations for both orders.[13] He acknowledged Peabody's good faith efforts to address the underlying methane hazard but found that the violative conditions were known, obvious, extensive, extremely dangerous, and of sufficient duration to support a finding of aggravated conduct. 44 FMSHRC at 385-88, 391. As discussed below, the Judge's findings are sufficiently supported by substantial evidence to affirm the unwarrantable failure determinations.

The record establishes that the violations were known and obvious. Butler arrived at the drill site within minutes of the initial methane event, was informed of the plan to use the drill, approved of the plan, and remained nearby until the final order for evacuation. Tr. 338-40, 345, 376-79. During this time, the drill kicked at least twice indicating the presence of 2% methane, and his own spotter gave an "over range" reading at least twice indicating the presence of 5% methane. Tr. 182-83, 338, 370-71, 378. It was obvious and known to an agent of the operator that equipment was energized and in use with methane fluctuating above 1.5%.[14]

With respect to extensiveness, the Judge found that "no less than six miners were allowed to remain" in an area with high methane levels and an energized drill.[15] 44 FMSHRC at 386. The record clearly shows that six miners remained in the general area, with at least two directly by the drill; Ferrin and Stevens worked the drill, Butler oversaw their work, and Cary, Ford and Mitchell traveled between the drill site and nearby areas to assist in evacuation and ventilation control. *See* Tr. 277-78, 280-81, 293, 344, 377-78. Extensiveness is not simply a matter of affected area, but "the material increase in the degree of risk to miners posed by the violation." *Eastern Associated Coal Corp*., 32 FMSHRC 1189, 1196 (Oct 2010). In some situations, extensiveness may turn on the number of persons affected by a violation. *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079-80 (Dec. 2014) (finding a violation non-extensive where the conduct only endangered one individual). The Judge's extensiveness determination is consistent with Commission precedent and substantially supported by the record.

The Judge "unequivocally" found a high degree of danger sufficient for aggravated conduct, based on a central finding that the drill "remained energized even while methane levels

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[13] The two orders at issue in this proceeding describe two aspects of related conduct (having and using energized equipment) arising from the same event and occurring under the same conditions. The Judge reasonably incorporated the bulk of his unwarrantable failure analysis of Order No. 9106663 into his analysis of Order No. 9106664 by reference. 44 FMSHRC at 391 n.3. We also jointly address the unwarrantability of both issuances.

[14] At the time of these events, Butler was a mine manager and shift supervisor with authority to direct work. Jt. Stip. 7, 30; Tr. 364-65. Accordingly, his conduct may be imputed to Peabody for unwarrantable failure purposes. *E.g.*, *Newtown Energy Inc.*, 38 FMSHRC 2033, 2046 (Aug. 2016).

[15] The Judge noted that 60 miners would initially have been at risk in the event of an explosion, but he conceded that the evacuation of Unit 3 significantly lowered the number of affected miners and acknowledged that the affected area was limited to the drill site. 44 FMSHRC at 385-86. Peabody's claim that the Judge failed to consider the limited physical area or the effect of the evacuation (P. Br. at 21-22) mischaracterizes the Judge's determination.

nearby exceeded five percent, creating the conditions that could have led to combustion and a major accident." 44 FMSHRC at 387. The record supports the Judge's factual finding that equipment was energized while methane reached combustible levels. Butler, Stevens and Ferrin's spotters each gave "over range" readings at least twice during the half hour that Stevens and Ferrin were engaged in pulling drill rods. Tr. 118-19, 183, 253-55, 371-72, 377-78; Gov. Ex. 9(b), 9(c). The danger inherent in combining elevated methane levels with a possible ignition source (energized equipment) is well recognized.[16] *See* 61 Fed. Reg. at 9777-78; Tr. 219. We accept the Judge's determination that working with an energized drill while methane reached combustible levels posed a high degree of danger. *See, e.g.*, *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding aggravated conduct based on "common knowledge that power lines are hazardous").

Ferrin and Butler suggest there was no risk of ignition because methane is combustible at 5% but the drill would shut off when methane levels reached 2%. Tr. 77, 349. Significantly, however, section 75.323(c)(2)(ii) requires equipment to be deenergized *and* power to be shut off at the power source whenever methane reaches 1.5%. The standard envisions possible ignition where methane levels are below 2%, and where equipment is "off" but there is still some power in the system. *See* 61 Fed. Reg. at 9778 (disconnecting power at the source "prevents accidental energization . . . and removes power from cables and circuits which may also be ignition sources"). Moreover, moments when the drill had kicked (and was therefore "off" but not fully de-powered) would naturally be the moments with higher methane levels. The fact that the drill was not in active operation when methane went above 2% does not eliminate the risk of ignition.[17]

Peabody also claims the Judge failed to consider that the work Ferrin and Stevens were engaged in would have eliminated the danger posed by the methane. P. Br. at 28. However, the question is not whether the conduct would have eventually eliminated an underlying hazard, but whether the violation itself posed a high degree of danger. *E.g., IO Coal*, 31 FMSHRC at 1355. The violative conduct here may have eventually reduced methane levels, but it also introduced an ignition source *before* methane levels had been reduced. Peabody's efforts to mitigate one hazard introduced another, more immediate hazard. Thus, the Judge reasonably found that introducing a potential source of ignition into an environment with periodically combustible levels of methane posed a high degree of danger.

With respect to duration, the Judge considered testimony that the drill was energized for half an hour and testimony that the six miners exited an hour after the inundation and concluded that "the drill remained energized for 30-60 minutes." 44 FMSHRC at 386. Peabody suggests

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[16] We note that Peabody has not contested the Judge's S&S finding that the presence of an ignition source such as an energized drill in conditions of 5% methane is reasonably likely to cause an explosion. 44 FMSHRC at 384.

[17] This analysis holds for Order No. 9106664 as well as Order No. 9106663. Although miners were not actively engaged in pulling drill rods during moments when the drill kicked power, they remained engaged in ongoing work that kept them by the drill. And as discussed above, the drill posed a potential ignition hazard even when not in operation. The fact that the miners were engaged in the work of pulling drill rods resulted in exposure to a dangerous hazard.

that the Judge overestimated the length of exposure by focusing on the evacuation time rather than the period that the drill was energized. P. Br. at 22-23. We agree. The violative condition was the presence and use of energized equipment, and substantial evidence only supports a finding that energized work was ongoing for approximately half an hour.[18] However, we note that the Judge provided a range, and substantial evidence supports the lower end of that range.

Peabody also claims the Judge's duration analysis failed to account for the intermittent nature of the elevated methane. The Judge conceded that methane levels dipped below 1.5% but emphasized that the methane also reached combustible levels multiple times. 44 FMSHRC at 386-87. As the Judge reasoned, the Commission has held that brief duration does not militate against a finding of unwarrantable failure where the condition is distinguishable by its high degree of danger and obvious nature, as is the case here. *Id.* at 386 (citing *Knight Hawk Coal LLC*, 38 FMSHRC 2361, 2371 (Sept 2016)); *Midwest Material Co.*, 19 FMSHRC 30, 36 (Jan. 1997). Given the weight of other factors indicating aggravated conduct, in particular the high degree of danger, the evidence that duration was intermittent and on the lower range of the Judge's estimation is not fatal to a determination of unwarrantable failure.

The Judge found five aggravating factors—obviousness, knowledge, extent, degree of danger and duration—with particular emphasis on degree of danger.[19] *See San Juan Coal Co.*, 29 FMSHRC 125, 129-30 (Mar. 2007) (finding that judges have discretion to reasonably give all relevant factors more or less weight). The Judge's factual findings are supported by substantial evidence, and his overall weighing of factors is reasonable. Respondent's actions in allowing the presence and use of energized equipment with methane levels fluctuating above 2% and 5% constitutes aggravated conduct.

As a final matter, Peabody claims there was no aggravated conduct because Butler (as Peabody's agent) reasonably believed the chosen course of action was proper. P. Br. at 20-21. The Commission has held that an operator's reasonable and good faith belief that cited conduct complied with applicable law can be a defense to an unwarrantable failure allegation. *IO Coal*, 31 FMSHRC at 1357-58; *Cypress Plateau Mining Corp.*, 16 FMSHRC 1610, 1614–16 (Aug.

[18] Energized work began shortly before Butler's 1:53 a.m. arrival and ended shortly before Rigsby's 2:25 a.m. evacuation order. *See* Tr. 185, 237, 339, 350, 377, 381.

[19] In addition to the five factors discussed above, the Judge found that the operator's efforts to abate the methane hazard were a mitigating factor, and there was no evidence to suggest that the operator had been given notice that greater efforts were necessary for compliance. 44 FMSHRC at 388. Regarding abatement, we generally agree that the instinct to address the underlying methane hazard was laudable. However, the question is whether the operator made efforts to abate the *violative condition*, and the violative condition here is the existence and use of energized equipment. Abatement would consist of stopping work and de-energizing. Regardless, any error in the Judge's analysis on this point is harmless, as giving less weight to a mitigating factor only strengthens the finding of unwarrantable failure.

1994). We concur with the Judge's finding that any such belief was unreasonable in this instance.[20]

There is evidence to suggest that Butler genuinely believed the chosen course of action was compliant with safety regulations. Ferrin told Butler that it was normal protocol to pull the drill rods in the event of a breach, and Butler chose to defer Ferrin's expertise.[21] Tr. 339-40, 345, 366. However, as discussed above, the standard plainly prohibits work with energized equipment where methane levels are above 1.5%. A supervisor familiar with the regulations would not reasonably have followed advice contrary to the plain language of the standard.[22] Notably, as soon as General Manager Rigsby learned that miners had been working with an energized drill, he immediately ordered Butler to shut everything down, stop work and evacuate. Tr. 404-05, 415, 418-19. Assuming Butler believed Ferrin's recommended course of action was compliant with the Secretary's regulations, such a belief was not reasonable. The defense fails, and the Judge's findings of unwarrantable failure stand.

C. The Personal Liability Assessments are Affirmed

Section 110(c) of the Act provides that "[w]henever a corporate operator violates a mandatory health or safety standard," any agent of the operator "who knowingly authorized, ordered or carried out such violation" shall be subject to penalties. 30 U.S.C. § 820(c). An individual acts knowingly where he is "in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1148 (Oct. 1998); *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981). Consistent with this caselaw, the Judge outlined a three-part test attaching liability where an agent (1) knew or had reason to know of, (2) was in a position remedy, and (3) failed to act to correct a violative condition. 44 FMSHRC

[20] Although the Judge did not explicitly conduct an analysis of this "reasonable and good faith belief" defense, his finding on the issue is clear. He states in his unwarrantable failure analysis that, in light of MSHA's safety standards, "no prudent operator would have believed that it was reasonable" to continue powering the drill or permit miners to continue working in a high-methane environment. 44 FMSHRC at 388, 391.

[21] Peabody argues that it was reasonable for Butler to trust Ferrin's expertise because Butler had no experience with this type of methane event. P. Br. at 21; Tr. 366. This argument appears to suggest ignorance as a defense, which the Commission has rejected in the negligence context. *Oak Grove Res LLC & Bienia*, 38 FMSHRC 1273, 1279-80 (June 2016). Regardless, the question is not whether it was reasonable for Butler rely on Ferrin, but whether the *belief* was reasonable, i.e., that a reasonable person would believe pulling drill rods using energized equipment in an environment with periodic high methane was permissible.

[22] As noted above, we do not decide here the full scope of "other work" prohibited by the standard, only that the standard clearly prohibits work with energized equipment. If different, non-energized conduct had been at issue—for example, if Peabody had been cited for pulling drill rods by hand—an argument for reasonable belief in compliance might have produced a different result.

at 391. The Judge concluded that Butler met all three requirements. Substantial evidence, including testimony from Butler himself, supports the Judge's personal liability finding.

Butler testified that he learned of Stevens' OR reading when he arrived at the drill site, and his own spotter gave an OR reading shortly thereafter. Tr. 337-39, 351. He then approved the plan to pull the drill rods and stayed at the drill site as the work continued. Tr. 339-40. While he was at the drill site, the drill kicked two or three times and Butler's spotter gave another OR reading. Tr. 370-71, 378. In other words, Butler knew that methane was fluctuating above 2% and 5%, and that energized work was occurring. Butler had knowledge that work on energized equipment was occurring where more than 1.5% methane was present.[23]

Butler was also in a position to remedy the violative conduct. He testified that he was the "number one man" on site and had the authority to direct work. Tr. 364-65. Ferrin and Stephens agreed that they would follow Butler's instructions. Tr. 48-49, 258-59, 268. Remedying the violative conduct would have involved shutting down equipment and stopping work, and Butler had the authority to do so. Instead, Butler allowed the drill team to continue.[24] Tr. 292, 339-40, 345-46. Butler knew of work with energized equipment in a high-methane environment, had the power to stop it, and did not do so. The requirements for personal liability are met.

Respondents contend that Butler's actions do not meet the level of culpability required for personal liability because he believed his chosen course of action best served miner safety. P. Br. at 29-34. As with unwarrantable failure, the Commission has held that personal liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992); *Austin Powder Company and Eaton*, 21 FMSHRC 18, 26-27 (Jan. 1999). Accordingly, a reasonable and good faith belief in the safety of the cited conduct may provide a defense against personal liability.[25] *Lafarge*, 20 FMSHRC at

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[23] The record need not establish that Butler knew the conduct violated the standard, only that he knew of the conduct. *See Kenny Richardson*, 3 FMSHRC at 16; *Freeman United Coal Mining Co. v. FMSHRC,* 108 F.3d 358, 363 (D.C. Cir. 1997). Peabody's argument that there was no knowing violation because Butler trusted Ferrin's advice (P. Br. at 32) fails.

[24] Peabody claims Butler *was* acting to correct the violative condition, by having Ferrin and Stevens plug the borehole to reduce methane levels. P. Br. at 31. As noted, *see* n.19 *supra*, the violative conditions requiring correction were the presence and use of energized equipment in a high-methane environment, not the presence of high methane itself.

[25] In the unwarrantable failure context, the focus of this defense is belief in compliance with the cited standard. *See, e.g.*, *Oak Grove*, 38 FMSHRC at 1279-80 (finding it unreasonable to believe a method of moving supply cars was compliant). This is consistent with the unwarrantable failure analysis' interest in whether an operator knew of the *violation*. Personal liability, however, turns on knowledge of the *condition*. *See* n. 23 *supra*. Accordingly, weight may be given to a belief in safety. *See Lafarge*, 20 FMSHRC at 1150 ("An unreasonable belief that a practice is safe . . . is not a defense to liability. . . ."); *see Wyoming Fuel Co.*, 16 FMSHRC 1618, 1629-30 (Aug. 1994) (where a manager reasonably believed his actions would correct

(continued…)

1150; *cf. Cyprus Plateau,* 16 FMSHRC at 1615-16 (addressing unwarrantable failure). Here, we find that any belief that the cited conduct was safe was unreasonable.[26]

As a preliminary matter, we echo the Judge's sentiment that Butler's good faith efforts to address the source of the methane hazard would be "laudable" in different circumstances. 44 FMSHRC at 389. Testimony from Butler and others indicate Butler genuinely believed allowing Ferrin and Stevens to pull drill rods and plug the borehole was the best way to reduce the risk of a methane explosion. Tr. 311-12, 345-46, 384, 386. Substantial evidence indicates that Butler had a good faith belief that he was acting in the interest of miner safety.

However, we are unconvinced that the cited conduct could *reasonably* be considered safe. By permitting miners to work with energized equipment, Butler risked incurring the very hazard section 75.323(c)(2) is intended to address, i.e., potential ignition a in high-methane environment. Peabody argues that ignition was unlikely because methane was below 2% whenever the drill was operating. P. Br. at 33; Tr. 77, 349. However, as discussed above, the standard envisions a risk of ignition below 2% and where equipment is "off" but there is still power in the system.

Respondents also point out that there had been no ignition up to the point at which Rigsby ordered evacuation, and the methane hazard could have been resolved with just a few more minutes of energized work. P. Br. at 33; Tr. 345, 386. However, safety requires more than luck and optimism. Just as the occurrence of an ignition is not necessary to prove an ignition hazard existed, the absence of an ignition does not prove that an ignition hazard did not exist. *Cf. Arch of Kentucky*, 20 FMSHRC 1321, 1330 (Dec. 1998) (the Secretary need not show that a violation caused an accident to prove that the violation was S&S). The energized drill introduced a potential ignition source, which fortunately did not result in an ignition in this instance. Further extending the period to allow Ferrin and Stevens to finish their work was a risk. Incurring a risk of ignition is not a reasonably safe method of addressing an ignition hazard.

Nor could the cited conduct reasonably be considered the safest option of addressing the more general hazard of a methane explosion. Combustion requires both elevated methane levels and an ignition source. The compliant method of addressing the combustion hazard would have been to stop work, de-energize equipment, let the methane bleed out and evacuate. Butler was aware of this option, and this was the course of action ultimately taken by the mine manager. Tr. 345-46, 393, 404-05, 415. Under this approach, methane levels would have taken some time to

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[25] (…continued)
methane problems and comply with the Secretary's regulations, the manager was not subject to personal liability and the violation was not unwarrantable).

[26] The Judge did not directly address this defense in his personal liability analysis. However, he found in his unwarrantable failure analysis that allowing miners to work with energized equipment in a high-methane environment was unreasonable given the significant risk it posed to miner safety. 44 FMSHRC at 388, 391. In other words, it was not reasonable to believe the cited conduct was safe. The failure to explicitly reiterate this finding is at most harmless error.

abate, but risk of ignition would have been significantly reduced and miners would have been removed from danger.

Instead, Butler approved energized work to plug the borehole. Essentially, Butler determined that the benefit of rapidly reducing methane levels outweighed the risk of incurring ignition. Butler's approach may have been more efficient with respect to reducing methane levels, but in the short term it increased the chances of combustion. Reducing excessive methane is a worthwhile goal, but not if the mine explodes first.[27] Butler's course of action was not the reasonable choice for miner safety. The defense is rejected, and the personal liability assessments stand.

IV.

Conclusion

For the reasons above, the Judge's decision is affirmed.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

[27] Cary testified that working to quickly resolve the methane leak was safer than allowing methane to build up during the 45 minutes it would take to evacuate. Tr. 311-12. However, assuming *arguendo* that circumstances exist where it would be appropriate to incur a risk of ignition, Cary's math does not add up. Ferrin stated that he and Stevens could have plugged the methane leak with another 15-20 minutes of work. Tr. 71. However, they had already been working for approximately half an hour when they were ordered to stop and evacuate. In other words, miners could spend 45 minutes evacuating with elevated methane levels but no potential ignition sources, or 45 minutes working with elevated methane levels *and* potential ignition sources (followed by 45 evacuating in high methane if the attempt to plug the leak failed). Cary's testimony fails to convince that the chosen course of action was safer than simply getting out of the mine.

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 3, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. TABLE ROCK ASPHALT CONSTRUCTION, INC.	Docket No. CENT 2018-361 A.C. No. 23-01836-466310

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 March 11, 2019, the Commission received from Table Rock Asphalt Construction, Inc. ("Table Rock") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On October 15, 2018, the Chief Administrative Law Judge issued an Order to Show Cause in response to Table Rock's failure to answer the Secretary of Labor's Petition for Assessment of Civil Penalty, which was issued on August 9, 2018. By its terms, the Order to Show Cause was deemed a Default Order on October 31, 2018, when the operator had not filed an answer within 30 days.

Table Rock asserts that it did not realize that it had failed to file an answer until it was notified while conducting settlement negotiations in this case with a Conference Litigation Representative with the Department of Labor's Mine Safety and Health Administration. The operator states that its safety manager, who was responsible for maintaining records and filing answers, had recently been replaced. Table Rock also notes that there is a copy of its Answer in its files but admits that it has no way to confirm that the answer was mailed to the proper addresses. The Secretary does not oppose the request to reopen, but urges the operator to take future penalty petitions seriously and answer them in a timely manner.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

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).

Having reviewed Table Rock's request and the Secretary's response, we find that the operator acted with excusable neglect due to its safety manager being replaced during the time in question, and that it acted in good faith in intending to timely file its answer based on the copy of the answer retained in the operator's files. In the interest of justice, we hereby reopen the proceeding and vacate the Default 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.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
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August 3, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CALLENDER CONSTRUCTION COMPANY, INC.	Docket No. LAKE 2020-0189-M A.C. No. 11-00214-494016

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 May 29, 2020, the Commission received from Callender Construction Company, Inc. ("Callender") 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).

The operator's motion referenced the A.C. No. for the case as 11-00214-494016, and requested to reopen the case to contest Citation Nos. 9387298, 9387397[1] and 9387296. It appears that the operator has paid the outstanding civil penalties associated with the citations at issue.

We note that the Commission's acknowledgement letter incorrectly listed the A.C. No. as 11-00214-498359. On June 3, 2020, the Commission received a response from the Secretary of Labor stating that he does not oppose the motion to reopen, but the Secretary's response referenced the same A.C. number as the Commission's May 29 acknowledgment letter and addressed different citations from the operator.

[1] The operator has listed this citation number incorrectly in its motion to reopen. The correct citation number is 9387297.

Since it appears the penalties at issue in this motion to reopen have already been paid, the parties are hereby **ORDERED TO SHOW CAUSE** within 30 days of the date of this order why this case, AC. No. 11-00214-494016, should not be dismissed.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
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August 3, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. LAKE 2022-0069 A.C. No. 12-02049-542961
v.	
HARRISON SAND & GRAVEL CO., INC.	Docket No. LAKE 2022-0070 A.C. No. 12-01151-542959

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On January 14, 2022, the Commission received from Harrison Sand & Gravel Co., Inc. ("Harrison") two motions seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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).

[1] For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers LAKE 2022-0069 and LAKE 2022-0070 because they involve similar factual and procedural issues. 29 C.F.R. § 2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that both proposed assessments were delivered on October 7, 2021, and became final orders of the Commission on November 8, 2021. Harrison asserts that, on approximately October 19, 2021, it mistakenly sent both its notices of contest and partial penalty payments to the address for the payment of penalties, instead of correctly mailing the notices of contest to a separate address, as required by MSHA. 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 Harrison's requests and the Secretary's responses, we find that the operator acted with excusable neglect by inadvertently mailing the notices of contest to the wrong address, despite doing so in a timely manner. In the interest of justice, we hereby reopen these matters and remand them 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 petitions for assessment of penalties within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Arthur R. Traynor, III
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/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
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August 3, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. LAKE 2022-0071 A.C. No. 12-00038-541770
v.	Docket No. LAKE 2022-0072 A.C. No. 12-00115-543456
NEW POINT STONE CO., INC.	

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On January 13, 2022, the Commission received from New Point Stone Co., Inc. ("New Point") 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). In addition, on January 14, 2022, the Commission received a second motion to reopen from the same operator.[1]

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).

[1] For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers LAKE 2022-0071 (involving the motion received on January 13, 2022) and LAKE 2022-0072 (involving the motion received on January 14, 2022) because they involve similar factual and procedural issues. 29 C.F.R. § 2700.12.

Regarding LAKE 2022-0071, records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on September 17, 2021, and became a final order of the Commission on October 18, 2021. The Secretary also provides a copy of a delinquency notice issued to the operator on December 28, 2021. New Point asserts that, on approximately September 30, 2021, it mistakenly sent both its notice of contest and a partial penalty payment to the address for the payment of penalties, instead of correctly mailing the notice of contest to a separate address, as required by MSHA. Similarly, concerning LAKE 2022-0072, MSHA records indicate that the proposed assessment was delivered on October 6, 2021, and became a final order of the Commission on November 5, 2021, and the operator makes the same assertion that, on approximately October 30, 2021, it mistakenly sent its notice of contest to the wrong address. 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 New Point's requests and the Secretary's responses, we find that the operator acted with excusable neglect in both matters by inadvertently mailing the notices of contest to the wrong address, despite doing so in a timely manner. In the interest of justice, we hereby reopen these matters and remand them 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 petitions for assessment of penalties within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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August 3, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. NEVADA READY MIX CORP	Docket No. WEST 2020-0401 A.C. No. 26-02142-513613

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 August 26, 2020, the Commission received from Nevada Ready Mix Corp ("Nevada") 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 May 7, 2020, and became a final order of the Commission on June 8, 2020. Nevada asserts that it had mistakenly marked the contest form. Counsel for the operator noticed the mistake, and directed an assistant to correct the form. However, the assistant failed to timely file a corrected contest form due in part to her

remote work setting and the disruption in normal office procedures caused by the COVID-19 pandemic. 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 Nevada's request and the Secretary's response, we find that the failure to timely file was the result of excusable neglect. 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.

/s/ Arthur R. Traynor, III
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/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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August 5, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. COUNTY LINE STONE CO INC.	Docket No. YORK 2022-0003 A.C. No. 30-00026-541944
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CONSOL PENNSYLVANIA COAL COMPANY LLC	Docket No. PENN 2021-0108 A.C. No. 36-07416-539405
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. RAMACO RESOURCES, LLC	Docket No. WEVA 2022-0260 A.C. No. 46-09495-549775

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

These captioned cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"), and are currently before Administrative Law Judge Michael G. Young. The Secretary of Labor has now filed a second Petition for Interlocutory Review of these cases pursuant to Commission Procedural Rule 76(a)(1)(ii), 29 C.F.R. § 2700.76(a)(1)(ii) ("The Judge has denied a party's motion for certification of the interlocutory ruling to the Commission, and the party files with the Commission a petition for interlocutory review within 30 days of the Judge's denial of such motion for certification.").[1]

[1] On June 28, 2022, the Judge issued three separate orders, each denying the Secretary of Labor's respective motion for certification of an interlocutory ruling.

The Commission denied the Secretary's first Petition for Interlocutory Review, finding that the Secretary's petition was filed prematurely as the Judge had yet to issue an order either granting or denying the subject motions to approve settlement.

Thereafter, the Secretary filed renewed motions with the Judge. On August 2, 2022, the Judge issued three separate orders, each denying the Secretary's renewed motions to approve settlement and for certification of interlocutory review.

The Secretary's motions to approve settlement were filed with the Judge in accordance with section 110(k) of the Mine Act, 30 U.S.C. § 820(k).[2] Each motion to approve settlement contains a proposal to vacate one or more of the citations at issue. In consideration of the motion, the Judge asked if the Secretary's representative could attest that the decision to vacate any citation was independent from, and not contingent upon, the compromise or settlement of other citations in that case. Instead of providing the Judge with his requested assurance, the Secretary filed motions for certification of interlocutory review with the Judge, requesting that the Judge certify to the Commission the question of whether the Secretary has unreviewable discretion to vacate a contested citation as part of a settlement.

As the Secretary's petition recognizes, a similar controlling question of law is currently on review before the Commission in *Crimson Oak Grove Resources*, SE 2021-0112, et al. Specifically, in *Crimson Oak*, on March 2, 2022, the Commission granted interluctory review of "the Judge's orders denying the motions and the issue of whether section 110(k) of the Mine Act authorizes review of the Secretary's decision to vacate a citation in the context of a settlement, when the vacatur is contingent upon the resolution of other citations."

Commission Procedural Rule 76 provides that "the Commission, by a majority vote . . . may grant interlocutory review upon a determination that the Judge's interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding." 29 C.F.R. § 2700.76(a)(2). Rule 76 further provides that "[i]nterlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission." 29 C.F.R. § 2700.76(a).

Upon consideration of the Secretary's petition, we hereby grant review of the Judge's orders and the issue of whether section 110(k) of the Mine Act authorizes review of the Secretary's decision to vacate a citation in the context of a settlement, when the vacatur is contingent upon the resolution of other citations.[3]

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[2] Section 110(k) of the Mine Act, 30 U.S.C. § 820(k), provides, in pertinent part, that "no proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission."

[3] Pursuant to Commission Procedural Rule 12, 29 C.F.R. § 2700.12, we hereby consolidate these three captioned proceedings: *County Line Stone Co., Inc*., YORK 2022-0003, *Consol Pennsylvania Coal Co*., LLC, PENN 2021-0108, and *Ramaco Resources, LLC,* WEVA 2022-0260.

The Secretary's petition also contains an unopposed motion to hold the cases in abeyance. We grant the Secretary's motion in part and order all proceedings before the Judge to be stayed pending futher order of the Commission. No hearing on these captioned matters shall commence without further order of the Commission.

The Secretary shall file an opening brief with the Commission within 30 days of this order. Any operator wishing to file a brief shall file that brief 30 days after the filing of the Secretary's brief.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
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/s/ Marco M. Rajkovich, Jr.
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August 22, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. MORTON SALT, INC.	Docket No. CENT 2022-0135 A.C. No. 16-00970-549832

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 27, 2022, Morton Salt, Inc., filed a motion 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).

The Secretary of Labor states that the records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that a proposed assessment was sent to the operator on February 15, 2022, and was delivered on March 4, 2022, via U.S. Postal Service Mail. The Secretary asserts that the proposed assessment became a final order of the Commission on April 3, 2022, 30 days after its delivery.

Morton Salt maintains that its failure to timely file was inadvertent. The operator's health and safety specialist was new to the position and attested that he was not familiar with the penalty contest process. He explained that he believed that a contest did not need to be filed because the citations were actively being conferenced and one was the subject of an ongoing investigation. The Secretary does not oppose the motion to reopen.

Having reviewed Morton Salt's request and the Secretary's response, we find that the operator's failure to timely file was the result of inadvertence. We hereby reopen this matter, and remand the case 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.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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August 22, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. BOB BERGKAMP CONSTRUCTION COMPANY, INC.	Docket No. CENT 2022-0184 A.C. No. 14-01622-550894

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 June 23, 2022, Bob Bergkamp Construction Company, Inc., filed a motion 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).

The Secretary of Labor states that the records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that a proposed assessment was sent to the operator on March 8, 2022, and was delivered on March 21, 2022, via U.S. Postal Service Mail. The Secretary asserts that the proposed assessment became a final order of the Commission on

April 20, 2022, 30 days after its delivery. The Secretary further asserts that MSHA issued a delinquency notice to the operator on June 6, 2022.

Bob Bergkamp maintains that it attempted to timely file a contest of the proposed penalties but mistakenly filed the notice with the Commission rather than with MSHA. The operator attached a confirmation email from the Commission verifying it uploaded a document to the Commission's electronic case management system on March 29, 2022. The Secretary does not oppose the operator's request to reopen.

Having reviewed Bob Bergkamp' s request and the Secretary's response, we find that the operator demonstrated that it failed to timely file because of a mistake. We hereby reopen this matter, and remand the case 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.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
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August 22, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. LAKE 2022-0015 A.C. No. 11-02664-536307
v.	Docket No. LAKE 2022-0016 A.C. No. 11-02664-538189
ICG ILLNOIS LLC	

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

These matters arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On October 20, 2021, the Commission received from ICG Illinois LLC ("ICG") a motion seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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).

[1] For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers LAKE 2022-0015 and LAKE 2022-0016 because they involve similar factual and procedural issues. 29 C.F.R. § 2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessments were delivered on June 18, 2021 and July 23, 2021, and became final orders of the Commission on July 19, 2021 and August 23, 2021, repectively. ICG asserts that notice of its intentention to contest the citations was mistakenly sent to MSHA's lock box address in St. Louis, along with ICG's payment for the uncontested citations. The contest notice should have been separately sent to MSHA's Arlington, Virginia office. 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 ICG's request and the Secretary's response, we find that after a delinquency notice was sent by MSHA, ICG acted promptly to determine the reason for such notice. The operator made three calls to MSHA, the final one occurring on October 6, 2021. After MSHA called back on October 7, 2021, and provided the operator with information regarding where to file a Motion to Reopen, the Commission received ICG's Motions 13 days later. In the interest of justice, we hereby reopen these matters and remand them 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 petitions for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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August 22, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. UNITED TACONITE LLC	Docket No. LAKE 2022-0059 A.C. No. 21-03404-531722

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 December 17, 2021, the Commission received from United Taconite LLC ("United Taconite") 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 March 29, 2021, and became a final order of the Commission on April 28, 2021. United Taconite asserts that the paralegal inadvertently deleted the filing deadline in this case, as a result of the operator receiving two proposed assessments close in time. The paralegal confused the deadline in this case with the one

she had already filed. 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 United Taconite's request and the Secretary's response, we find that excusable neglect led to the missed deadline. Moreover, upon learning of its delinquency, the operator conducted an investigation and filed the motion to reopen in a timely manner. 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.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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August 22, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. LAFARGE HOLCIM	Docket No. LAKE 2022-0098 A.C. No. 20-00051-545546

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 March 7, 2022, LaFarge Holcim filed a motion 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).

The Secretary of Labor states that the records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that a proposed assessment was sent to the operator on November 17, 2021, and was delivered on December 3, 2021, via U.S. Postal Service Mail. The Secretary received payment for one of the two citations at issue on December

14, 2021. The Secretary asserts that the proposed assessment became a final order of the Commission on January 2, 2022, 30 days after its delivery.

LaFarge Holcim maintains that it timely filed to contest Citation No. 9622263 at the time it submitted payment for the second citation at issue. The operator states that it became aware of the outstanding balance for Citation No. 9622263 on January 27, 2022, and thereafter sought to reopen the final order.

Having reviewed LaFarge Holcim's request and the Secretary's response, we find that the operator attempted to timely file to contest Citation No. 9622263 and MSHA's non-receipt was either inadvertent or the result of a mistake. We hereby reopen this matter, and remand the case 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.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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August 22, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. FARWEST PORTABLE CRUSHING, INC.	Docket No. WEST 2020-0362 A.C. No. 45-02314-515508

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 1, 2021, the Commission received from Farwest Portable Crushing Inc. ("Farwest") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On January 7, 2021, the Chief Administrative Law Judge issued an Order to Show Cause in response to Farwest's perceived failure to answer the Secretary of Labor's August 30, 2020, Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on February 6, 2021, when it appeared that the operator had not responded to it within 30 days.

Farwest asserts that it timely filed an Answer to the Secretary's Petition. In support of this assertion, Farwest submits a copy of a certified mail receipt, postmarked September 29, 2020, addressed to "MSHA Review Commission" at 1331 Pennsylvania Ave., N.W. Washington, D.C. 20004-1710. The operator asserts further that it also responded to the Judge's January 7, 2021, Order to Show Cause by resubmitting its paperwork. To support this claim, Farwest submits copies of a certified mail receipt postmarked January 22, 2021, addressed to "MSHA" but sent to the Commission's address, referenced above. Farwest explains that in both cases it did not receive signature confirmation of receipt, but neither did it receive its envelope back. The Secretary does not oppose the request to reopen.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission.

30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

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).

Having reviewed Farwest's request and the Secretary's response, we find that, although Farwest did not achieve a successful delivery until April 1, 2021, the operator has submitted documentation of its prior attempts to file timely responses to both the Secretary's Petition and the Judge's show cause order. In the interest of justice, we hereby reopen the proceeding and vacate the Default 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.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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August 22, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. KANAWHA EAGLE MINING, LLC	Docket No. WEVA 2020-0476 A.C. No. 46-03085-510824

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 July 20, 2020, Kanawha Eagle Mining, LLC, filed a motion 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).

The Secretary of Labor states that the records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that a proposed assessment was sent to the operator on March 17, 2020, and was delivered on April 15, 2020, via U.S. Postal Service Mail. The Secretary asserts that the proposed assessment became a final order of the Commission on

May 15, 2020, 30 days after its delivery. The Secretary sent the operator a delinquency notice on June 30, 2020.

Kanawha Eagle asserts that it failed to timely contest the penalties at issue due to a mistake. Specifically, its safety director attests that he mistakenly checked a box to contest one citation ($123 penalty) on the assessment; he instead intended to check the box located just below which would have indicated the operator's intent to contest all the penalties at issue ($17,385). The safety director maintains that he timely mailed the notice of contest on April 17, 2020. The Secretary does not oppose the operator's request to reopen.

Having reviewed Kanawha Eagle's request and the Secretary's response, we find that the operator failed to timely contest all the penalties at issue due to a mistake. We hereby reopen this matter, and remand the case 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.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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August 22, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. HARMAN BRANCH MINING INC.	Docket No. WEVA 2021-0259 A.C. No. 46-09207-527987

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.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
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August 24, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. LIBERTY AGGREGATES LLC	Docket No. CENT 2022-0145 A.C. No. 23-02513-548052

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 May 4, 2022, Liberty Aggregates, LLC, filed a motion 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).

The Secretary of Labor states that records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that a proposed assessment was sent to the operator on January 4, 2022, and was delivered on January 18, 2022. The Secretary asserts that the assessment became a final order on February 17, 2022, 30 days after its delivery. On March 4, 2022, MSHA received partial payment toward one of the four citations at issue in the

assessment. On April 5, 2022, MSHA sent the operator a delinquency notice for the remaining amount.

Liberty Aggregates states that during January and February 2022, it made multiple attempts to contact the local MSHA field office and the MSHA national office to understand the basis for the large penalty assessment. On March 24, 2022, it discovered that the subject citations were listed as delinquent on MSHA's website. Shortly thereafter, the operator contacted counsel and filed the subject motion to reopen. Liberty Aggregates asserts that its failure to timely contest the penalty assessment was inadvertent. The Secretary does not oppose the motion to reopen.

Having reviewed Liberty Aggregate's request and the Secretary's response, we find the operator's failure to timely contest the proposed assessment was inadvertent. We hereby reopen this matter, and remand the case 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.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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August 24, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. NYRSTAR TENNESSE MINES GORDONSVILLE, LLC	Docket No. SE 2022-0118 A.C. No. 40-00864-551693

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 May 19, 2022, Nyrstar Tennessee Mines Gordonsville, LLC, filed a motion to reopen a penalty assessment that it previously paid.

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).

The Secretary of Labor reports that on April 12, 2022, the Department of Labor's Mine Safety and Health Administration ("MSHA") timely received full payment ($12,297) for the penalties associated with the 24 citations at issue.

Nyrstar asserts that its failure to contest the penalties was a mistake. Along with the motion to reopen, Nyrstar attached an affidavit from a superintendent stating that he did not

timely contest the penalties because he believed that the operator and MSHA had reached an agreement on the abatement of each violation at issue. However, no agreement was ultimately reached. As the Secretary acknowledges, as of the time of filing, the parties have still not yet reached an agreement to terminate the citations. The Secretary does not oppose the motion to reopen, noting that reopening will allow the parties to contest citations before the Commission if they are not able to resolve the outstanding issues.

Having reviewed Nyrstar's request and the Secretary's response, we find that the operator's failure to timely file was the result of a mistake. We hereby reopen this matter, and remand the case 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.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 24, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. WEST 2022-0199 A.C. No. 26-00002-537140
v.	Docket No. WEST 2022-0200 A.C. No. 26-00002-538815
PREMIER MAGNESIA LLC	

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act").[1] On April 7, 2021, the Commission received two motions from Premier Magnesia, LLC, seeking to reopen penalty assessments that had become final orders 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).

The Secretary of Labor states that the Department of Labor's Mine Safety and Health Administration ("MSHA") mailed the proposed assessments to the operator via U.S. Postal

[1] For the limited purpose of addressing these motions to reopen, we hereby consolidate Docket Numbers WEST 2022-0199 and WEST 2022-0200 because they involve similar factual and procedural issues. 29 C.F.R. § 2700.12.

Service Mail. The Secretary contends that the proposed assessment associated with Docket No. WEST 2022-0199 was mailed on June 17, 2021, and was delivered on July 18, 2021; the assessment associated with Docket No. WEST 2022-0200 was mailed on July 15, 2021, and was delivered on August 21, 2021.

The Secretary contends that the proposed assessment in Docket No. WEST 2022-0199 became a final order of the Commission on August 17, 2021, 30 days after its delivery. The proposed assessment in Docket No. WEST 2022-0200 became a final order of the Commission on September 20, 2021, 30 days after its delivery.

Premier Magnesia asserts that the proposed assessments were not timely contested as a result of inadvertence and due to employee turn-over in its safety department. The new safety manager became aware of the delinquent penalties after reviewing the operator's violation history on MSHA's website. The safety manager attests that he has been unable to locate the paperwork for the proposed assessments. The Secretary of Labor does not oppose the motions to reopen.

Having reviewed the operator's request and the Secretary's response, we find that the operator's failure to timely contest the proposed assessments was inadvertent. We hereby reopen these matters, and remand the cases 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.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 25, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CONSOL PENNSYLVANIA COAL COMPANY, LLC	Docket No. PENN 2022-0083

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On May 25, 2022, the Commission received from Consol Pennsylvania Coal Company, LLC a motion seeking to permit late filing to contest an order issued pursuant to section 107(a) of the Mine Act, 30 U.S.C. § 817(a), and a motion to reopen final orders of the Commission pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a).

Under section 107(e)(1) of the Mine Act, an operator who wishes to contest an order issued pursuant to section 107(a) may request review by the Commission no later than 30 days after being notified of such order. 30 U.S.C. § 817(e)(1). Commission Procedural Rule 9 allows the Commission to extend the filing time for a document for good cause shown. 29 C.F.R. § 2700.9(a). The rule allows the Commission to grant motions for extensions of time after the designated filing time has expired if the party requesting the extension can show, in writing, the reasons for its failure to make the request before the filing deadline. 29 C.F.R. § 2700.9(b).

Relying on Rule 60(b) of the Federal Rules of Civil Procedure, we have 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, appropriate proceedings on the merits may be permitted. *See Coal Prep. Servs., Inc*., 17 FMSHRC 1529, 1530 (Sept. 1995). We find that the same considerations apply to the order here under Commission Procedural Rule 9. *See e.g., Jones Bros MFG, Inc*., 38 FMSHRC 234, 235 (Feb. 2016).

The subject section 107(a) order, Order No. 9204789, was issued on February 9, 2022. The deadline for contesting the order pursuant to section 107(e)(1) was March 11, 2022. Consol states that it neglected to timely file a contest to the order with the Commission because it instead was attempting to meet with Mine Safety and Health Administration ("MSHA") officials to resolve the matter. The Secretary does not oppose Consol's motion to permit late

filing. However, the Secretary notes that Consol is a large operator, familiar with the Commission's procedural rules, and Consol's motion neither provides an explanation as to why it did not file a timely contest with the Commission, nor is the motion accompanied by a declaration.

Consol also moves to reopen Citation Nos. 9204790, 9204791 and 9204793. The Commission possesses 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 on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. 29 C.F.R. § 2700.1(b) ("the Commission . . . shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787.

Of the three citations, only Citation No. 9204793 has become a final order of the Commission.[1] Consol originally did not contest the penalty for Citation No. 9204793 in proposed assessment number 000552311. Instead, Consol timely paid the full $133 civil penalty for Citation No. 9204793. Consol did however timely contest ten other citations that were included within proposed assessment number 000552311, and those ten contested citations are now before a Commission Administrative Law Judge in Docket No. PENN 2022-0069. Nevertheless, the Secretary does not oppose Consol's motion to reopen the citation.

Accordingly, in the interests of justice, we hereby remand Consol's motion to permit late filing to the Chief Administrative Law Judge for a determination of whether good cause exists for the operator's failure to timely contest Order No. 9204789 with the Commission. In addition, we also remand Consol's motion to reopen Citation No. 9204793 to the Chief Judge

[1] Citation No. 9204790 has not yet been assessed a civil penalty (www.msha.gov/mine-data-retrieval-system, last visited August 23, 2022). Consol may obtain Commission review of the citation by contesting the proposed penalty after it is assessed. Furthermore, Citation No. 9204791 was timely contested by Consol and is currently before a Commission Administrative Law Judge in Docket No. PENN 2022-0112.

for a determination of whether good cause exists for the operator's failure to timely contest the proposed assessment.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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August 26, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. WASHINGTON COUNTY AGGREGATES, INC.	Docket No. CENT 2022-0012 A.C. No. 23-02077-540128

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 12, 2021, the Commission received from Washington County Aggregates, Inc. ("Washington County") 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 August 16, 2021 and became a final order of the Commission on September 15, 2021. Washington County asserts that it

mistakenly believed that its written request for a safety and health conference with the MSHA district office started the process of contesting citations, and that it would be notified in writing if its request was granted or not. Furthermore, shortly after the penalty assessments were delivered the mine owner, and subsequently certain administrative staff, came down with Covid, preventing Washington County from timely filing a contest of the proposed penalties. 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 Washington County's request and the Secretary's response, we find that the operator acted with excusable neglect in failing to timely file a contest of the proposed penalties. 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.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 26, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. GREEN BROTHERS GRAVEL COMPANY, INC.	Docket No. SE 2021-0194 A.C. No. 22-00650-542085

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 March 30, 2022, the Commission received from Green Brothers Gravel Company, Inc. ("Green Bros.") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On December 21, 2021, the Chief Administrative Law Judge issued an Order to Show Cause in response to Green Bros.' perceived failure to answer the Secretary of Labor's October 21, 2021 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on January 20, 2022, when it appeared that the operator had not filed an answer within 30 days.

Green Bros. asserts that, due to servicing rules in place during the COVID-19 pandemic, MSHA's petition for Assessment of Civil Penalty was not mailed to the operator but was instead served by email. Due to a clerical oversight, counsel for Green Bros.' email address contained a typographical error and, as a result, Green Bros. maintains that it did not receive a copy of the Assessment or the Chief Judge's subsequent Order to Show Cause and Order of Default. The Secretary does not oppose the request to reopen.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

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).

Having reviewed Green Bros.' request and the Secretary's response, we find that the failure to respond was due to a clerical error and that the operator promptly moved to reopen the case upon discovering the mistake. In the interest of justice, we hereby reopen the proceeding and vacate the Default 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.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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August 29, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. ESPINOZA STONE, INC.	Docket No. CENT 2021-0168 A.C. No. 41-04914-515484

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY: Althen and Rajkovich, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On June 21, 2021, the Commission received from Espinoza Stone, Inc. ("Espinoza") 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 June 12, 2020, and became a final order of the Commission on July 13, 2020. Espinoza asserts that its failure to timely contest the proposed assessments was the result of the unprecedented strain caused by the Covid 19 pandemic. The operator contends it did not discover its failure to contest until June 1, 2021, and

that it has put processes in place that allow the Company to handle the administrative tasks required. 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 Espinoza's request and the Secretary's response, we find that the operator's failure to timely contest the proposed penalties was excusable neglect, resulting from the unprecedented strain of the Covid 19 pandemic. After discovering its mistake, Espinoza filed a motion to reopen 20 days later. 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.

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

Chair Traynor, dissenting:

I dissent from my colleagues' decision that Espinoza Stone demonstrated its failure to timely contest the proposed penalties was the result of excusable neglect resulting from the strain of the Covid-19 pandemic. The operator's filing does not support this conclusion. It provides no specific details concerning the facts and circumstances of its failure to timely contest. There is no declaration from a responsible party. There is nothing more than an unsupported assertion that its failure to timely contest was caused by the pandemic.

Espinoza Stone routinely defaults on penalties. Proposed Assessment No. 000515484 states that the operator had unpaid balances in separate cases (000506852 dated 01/02/2020 and 000496409 dated 07/31/2019). Each of these prior assessments were issued months before the widespread disruptions caused by the pandemic. The prior defaults undermine the assertion that the current default was the result of a single lapse. Accordingly, the operator has not satisfied its burden to demonstrate that its failure to contest the subject assessment was the result of excusable neglect.[1]

In addition, the motion to reopen was filed just shy of the one-year limitation period we apply to such motions.[2] Espinoza Stone does not explain why 343 days passed before it filed the instant motion to reopen. Its motion merely states that it discovered its failure to contest the proposed penalties 20 days prior to filing its motion. The motion neither provides an explanation of how the lapse was discovered, nor addresses the operator's conduct in the intervening period between final order and discovery of the problem. In particular, the operator does not address the separate notice of delinquency issued by the Mine Safety and Health Administration on August 27, 2020.

For these reasons, I find that Espinoza Stone has not demonstrated that its failure to timely file was the result of excusable neglect in this case. *See E & G Masonry Stone No. 2*, 36 FMSHRC 5 (Jan. 2014) ("Due to the extraordinary nature of reopening a penalty that has become final, the operator has the burden of showing that it should be granted such relief

[1] It is well established that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res*., LLC, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co*., 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co*., 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008).

[2] Pursuant to Rule 60(c)(1) of the Federal Rules of Civil Procedure, a motion under Rule 60(b) "must be made within a reasonable time - and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding."

through a detailed explanation of its failure to timely contest the penalty and any delays in filing for reopening.").

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 17, 2022

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. COVOL FUELS NO.3 LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. KENT 2022-0040 A.C. No. 15-19702-549694 Mine: Straight Creek Mine

DECISION DENYING MOTION TO APPROVE SETTLEMENT

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed the Motion to Approve Settlement of the citation involved in this matter. The parties move to modify the citation, as stated below. The penalty would be reduced by **78%**, from the original assessed amount of **$3,546.00** to **$796.00**. As the Motion does not meet the Commission's requirements for approval of settlements, per its decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal*") and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018), the Motion is **DENIED**.

Citation Number	Proposed Penalty	Settlement Amount	Modification
9233080	$3,546.00	$796.00	Reduction in the likelihood of occurrence from "Occurred" to "Reasonably Likely"
Totals	**$3,546.00**	**$796.00**	**Seventy-Eight (78%) Percent Penalty Reduction**

Citation No. 9233080 was issued on December 16, 2021 for a violation of 30 C.F.R. §75.202(a). Titled "Protection from falls of roof, face and ribs," the standard specifies that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise

controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. §75.202(a).

The citation read:

> The mine operator is not fully controlling the mine roof to protect person from falls of the roof. When checked the mine roof has collapsed between the crosscuts 20 and 21 along the# 6 entry of the primary escapeway. This roof fall is approximately 20 feet in width and 35 feet in length and 9 feet in thickness. This citation is being issued in conjunction with 103k order# 9233079.
>
> Standard 75.202(a) was cited 4 times in two years at mine 1519702 (4 to the operator, 0 to a contractor).
>
> Pet. for a Civil Penalty at 16.

For the gravity of the violation, the likelihood of injury or illness was marked by the inspector in his evaluation to have "occurred," with the injury or illness reasonably expected to be "fatal," affecting one person. *Id*. The violation was found to be significant and substantial. *Id*. Negligence was found to be moderate. *Id*. A 103(k) Order, No. 9233079**,** was not included in the record, nor was the abatement document for the violation. The latter action to terminate was due four days after the issuance of the citation, on December 20, 2021. *Id*. Both these documents are essential for the Court to make an informed review of the Motion, per section 110(k) of the Act.

The Secretary moves to modify the citation, changing the likelihood from "occurred" to "reasonably likely," supplying the following in support:

> Basis of compromise: A reduction in the likelihood of an injury or illness to occur.
>
> There are factual disputes regarding the likelihood of an injury producing event.
>
> The Respondent asserts it was unlikely for an accident to occur that would result in any illness or injuries. The Respondent argues that no injury or illness occurred as a result of the cited condition. The Respondent further argues that the unplanned roof fall was in an area where miners do not normally work or travel, that no one was working at the time the unplanned fall occurred and that page 2-3, of PH20-I-3, MSHA Citation and Order Writing Handbook, clearly states that occurred can only be checked when an injury or illness has actually occurred. Therefore, the Respondent concludes it was unlikely for an accident to occur that would result in any illness or injury given the aforementioned facts. For the purpose of settlement, the Petitioner proposes, and the Respondent accepts a reduction in the likelihood of occurrence from "Occurred" to "Reasonably Likely". The parties have discussed

the citation and propose a revised penalty of $796.00, which is consistent with the penalty table found in Part 100, 30CFR.

Mot. to Approve Settlement at 3.

Analysis

This case presents a most unusual assertion. To begin, one must first comprehend the enormity of the roof fall – a roof collapse in the primary escapeway which was approximately 20 feet in width, 35 feet in length, and 9 feet in thickness. These figures evince the enormously large roof fall. A fraction of that fall of roof would've killed anyone who happened to be at that location when it occurred.

The Motion seeks to reduce the inspector's gravity evaluation down from "Occurred," bypassing "Highly Likely," and arriving at "Reasonably Likely," as the designation. The Respondent presents two arguments in support of reducing the penalty by 78% from $3,546.00 to what the Court views as a non-incentivizing penalty amount at $796.00. One argument is that it was unlikely for an accident to occur that would result in any illness or injuries. This contention rests upon the fact that that the fall occurred in an area where miners do not normally work or travel, and that no one was working at the time the unplanned fall. The second argument is that MSHA can't designate a violation as "Occurred" unless an injury or illness "actually occurred." The Motion claims there are "factual disputes regarding the likelihood of an injury producing event," even though Respondent's arguments are not factual disputes but rather disagreement as to the legal interpretation of the facts. Neither argument supports the "Reasonably Likely" gravity designation.

The first contention – that the fall was in an area where miners do not normally work or travel, and that no one was working at the time the unplanned fall, runs afoul of well-established case law that a violation must be considered in the context of continued normal mining operations. An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co*., 7 FMSHRC 1125, 1130 (Aug. 1985). "[T]he gravity determination requires a predictive inquiry into whether the violation is reasonably likely to result in a reasonably serious injury, *see Secretary of Labor v. Mathies Coal Co*., 6 FMSHRC 1, 3–4 (Jan. 1984), a prediction which may assume 'continued normal mining operations,' *U.S. Steel Mining Co*., 6 FMSHRC at 1574." *Rex Coal Co*., *v. Sec'y of Lab., Mine Safety & Health Admin.,* 630 F. App'x, 359, 363 (6th Cir. 2015). "An S&S determination must be made at the time the citation is issued 'without any assumptions as to abatement' and in the context of 'continued normal mining operations.' *Paramont Coal Co*., 37 FMSRHC 981, 985 (May 2015)." *Mach Mining,* 40 FMSHRC 1, 6 (Jan. 2018).

As to the second argument, that the Secretary may not designate a violation as "occurred," under these circumstances, the Respondent looks to MSHA's Citation and Order Writing Handbook. U.S. Dep't of Lab., Mine Safety and Health Admin., *Citation and Order Writing Handbook*, *PH20-I-3* (Dec. 2020). (Handbook). It is true that the Handbook states that "occurred" can only be checked when an injury or illness has actually occurred. Handboo PH20-I-3 at page 2-3. Since no injury or illness actually occurred as a result of the cited

condition, Respondent asserts that gravity box designation may not be checked. Instead, the Secretary and Respondent agree to reclassify the gravity as "reasonably likely" to occur.

However, this rationale doesn't square with the requirement of the cited standard, 30 C.F.R. §75.202(a), which specifies that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." Clearly, and with a staggeringly large failure, the roof in this instance was not supported or otherwise controlled, and in that safety-enforcing sense, the gravity *occurred*. The gravity of the violation should not turn on whether the mine operator had the sheer luck of no miner being at that location at that moment of inundation. If that were the test, the agreement of the parties to designate the gravity as 'reasonably likely' would not make sense either – no one was injured when the collapse occurred, so following the line of reasoning regarding 'occurred,' it was not 'reasonably likely' either and by that thinking 'no likelihood' should have been the designation.

The Respondent's unusual line of reasoning has been rejected. *See, e.g.*, *Clintwood Elkhorn Mining Co.*, 38 FMSHRC 458, 466 (Mar. 2016) (ALJ), upholding the inspector's determination an injury reasonably expected to be "fatal" and "occurred" when a miner received abrasions and bruising in a runaway truck accident. The inspector "designated the injury as reasonably expected to result in a fatality because this type of accident -- a runaway truck -- could have resulted, and had resulted, in fatalities in the past." *Id*.

"As a general proposition, rules of statutory construction can be employed in the interpretation of administrative regulations. *See C. D. Sands, 1A Sutherland Statutory Construction*, § 31.06, p. 362 (1972). According to 2 Am. Jur. 2d, Administrative Law, § 307 (1962), 'rules made in the exercise of a power delegated by statute should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason.'" *Golden R Coal Co.,* 2 FMSHRC 446, 448-49 (Feb. 1980) (ALJ)
"It is also an established canon of statutory construction that a legislature's words should never be given a meaning that produces a stunningly counterintuitive result—at least if those words, read without undue straining, will bear another, less jarring meaning."
United States v. O'Neil, 11 F.3d 292, 297 (1st Cir. 1993). The principle is that statutes should not be read to produce illogical results which are at odds with the statute's underlying purposes. *Consolidation Coal Co*., 14 FMSHRC 956, 963 (June 1992). In the Court's view, the construction urged by the Respondent produces such illogical results.

Further, the MSHA Handbook on Citation and Order Writing represents internal agency guidance and policy directives that are not binding on the Secretary in his enforcement actions. *See, e.g., Mingo Logan Coal Co*., 19 FMSHRC 246, 250 (1997), *aff'd Mingo Logan Coal Co. v. Sec'y of Labor*, 133 F.3d 916, *3 (4th Cir. 1988). The standard takes precedence over the Handbook, so in determining likelihood, the relevant event is not the injury itself but the potentially injurious event that the standard exists to prevent, here, a massive roof collapse.

In addition, the Handbook is in tension with the wording of 30 C.F.R. §100.3(e), which specifies that "Gravity is determined by the likelihood of the *occurrence of the event against*

which a standard is directed." (emphasis added). The event against which 30 C.F.R. §75.202(a) is directed – "falls of the roof, face or ribs and coal or rock bursts," – *did occur*, even though no miner was injured by the fall. The standard takes precedence over the Handbook, so in determining likelihood, the relevant event is not the injury itself but the potentially injurious event that the standard exists to prevent, a roof collapse which in this instance would clearly be fatal.

That the mine operator should be able to have a 78% reduction in the penalty assessed resting entirely that no one died is repugnant to the overarching principles of the Mine Act and the Secretary's duty to take care of the safety and health of our Nation's miners. Permitting Respondent to avoid the higher penalty amount for the roof fall because no miners were actually injured also frustrates the deterrent aims of the civil penalty system. One of Congress' central goals for the Mine Act's civil penalty scheme was to ensure "effective and meaningful compliance" by imposing penalties "of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance."[1] In the Court's view, the $796.00 hand slap does not accomplish Congress' goal.

Beyond the remarks above, the Motion does not meet the Commission's test for review of settlements because, even under its nonintuitive definition of 'facts,' the motion is deficient. This is because, at bottom, the Respondent is making a legal, not a factual, argument, about the proper evaluation of the gravity of the violation. The first two elements of the Commission's test for review of settlements are always present, because without them no motion could be presented. Those are: the amount of the penalty proposed by the Secretary, and the amount of the penalty agreed to in settlement. Because no agreed-upon 'facts' have been offered, but rather only the legal argument that one cannot designate the injury as 'occurred' unless there has been an injury, the Motion is deficient.

There are other issues with the settlement motion. The citation was issued in conjunction with a 103k order, Number 9233079. In carrying out its responsibilities under Section 110(k) the Court should be able to view this relevant document. In addition, the official record does not include the termination document associated with the citation. Both documents constitute part of the official record for this matter, and even under the Court's limited purview, it should be able to view these essential parts of the record. They are to be part of the public record, not hidden from view.

Respondent's claims about miners' absence in the area – no miners were working in the area at the time of the roof fall, and miners do not typically work or travel in the area where the roof fall occurred – amount to an ersatz "redundant safety measures" argument, rejected by

[1] S. Rep. 95-181, 41 (1977).

federal courts.[2] Miners avoiding the area do not absolve Respondent of its obligation to follow all safety standards.

The Court has considered the motion in the context of comparing it with the Commission's *AmCoal* decision and finds that it does not meet that decision's standard of review. Accordingly, the motion to approve settlement is **DENIED.**

/s/ William B. Moran
William B. Moran
Administrative Law Judge

[2] Federal case law is clear that redundant safety measures are not to be considered in evaluating a hazard. For example, in *Knox Creek Coal*, 811 F.3d 148 (4th Cir. 2016), that Court observed:

> "[i]f mine operators could avoid S & S liability—which is the primary sanction they fear under the Mine Act—by complying with redundant safety standards, operators could pick and choose the standards with which they wished to comply."…Such a policy would make such standards "mandatory" in name only. It is therefore unsurprising that other appellate courts have concluded that '[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the [S & S] inquiry.' Cumberland Coal, 717 F.3d at 1029; see also Buck Creek, 52 F.3d at 136.

Knox Creek Coal, 811 F.3d 148, 162 (4th Cir. 2016).

Regarding this issue, in *Consolidation Coal*, 895 F.3d 113, (D.C. Cir. 2018), the D.C. Circuit, referring to its decision in *Cumberland Coal Resources, LP v. Federal Mine Safety & Health Review Commission*, 717 F.3d 1020 (D.C. Cir. 2013), noted that it:

> interpreted the statutory text to focus on the "nature" of "the violation" rather than any surrounding circumstances. More to the point, the court held that "consideration of redundant safety measures,"—that is, "preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely"—"is inconsistent with the language of [Section] 814(d)(1)." *Id.* at 1028–1029.

Id. at 118-119.

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ADMINISTRATIVE LAW JUDGE ORDERS

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August 18, 2022

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. CENT 2022-0010-M A.C. No. 41-00009-542457
v.	Fairland Plant & Qys
CACTUS CANYON QUARRIES INC, Respondent	

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

Before: Judge Manning

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. On May 6, 2022, Respondent, Cactus Canyon Quarries Inc. ("Cactus Canyon"), filed a Motion for Summary Decision ("CCQ Mot."). Subsequently, on August 15, 2022, the Secretary filed his Objection and Response to Respondent's Motion for Summary Decision ("Sec'y Resp."). [1] I find summary decision is inappropriate and **DENY** Respondent's motion.

Although the procedural posture of this case is long and complicated, for purposes of this order only certain events need be mentioned. On October 4, 2021, Respondent mailed its Notice of Contest to MSHA. Subsequently, on November 26, 2021, i.e., more than 45 days after receipt of the Notice of Contest, the Secretary filed a Motion for Extension of Time to File Initial Pleading citing the need for "additional time to allow the parties to thoroughly explore settlement in this matter." On December 1, 2021, the Commission's Chief Administrative Law Judge (the "Chief Judge") found that the Secretary had shown good cause and issued an order granting the Secretary's motion and affording the Secretary until January 18, 2022, to file the initial pleading (the "Chief Judge's Order"). After first asking for reconsideration of the Chief Judge's Order, which was not granted, Respondent filed a petition for discretionary review on December 23, 2021, challenging the validity of the Chief Judge's Order and asking that the case be dismissed. On January 4, 2022, the Commission issued a notice stating that "after consideration by the Commissioners, no two Commissioners voted to grant the petition [for discretionary review] or to otherwise order review." Finally, on January 18, 2022, the Secretary

[1] At the time Respondent filed its motion the case was stayed pending an appeal to the Fifth Circuit Court of Appeals. On July 18, 2022, the Fifth Circuit dismissed the appeal for lack of subject matter jurisdiction. Subsequently, I lifted the stay and ordered the Secretary to file his response to the motion by no later than August 15, 2022.

electronically filed the petition for assessment of penalty (the "penalty petition") with the Commission and served the same upon Respondent via email.

Cactus Canyon moves the court to vacate the citations at issue and dismiss the penalty petition with prejudice. CCQ Mot. 12. Respondent argues the Commission's decision in *Salt Lake County Road Dep't.*, 3 FMSHRC 1714 (July 1981), as well as other Commission case law, constitute "Black Letter Law" that "when the Secretary is late-filing a petition, the Secretary must file the petition to institute the proceeding and file a motion for forgiveness / excuse showing good cause to excuse the late filing." Respondent takes issue with the validity of the Chief Judge's Order and argues the Secretary failed to timely file and serve the penalty petition and/or properly show good cause for why the late filing should be excused.[2]

The Secretary, in his response, argues that the penalty petition was timely filed and served pursuant to the deadline set forth in the Chief Judge's Order. Sec'y Resp. 10-11. The Secretary asserts it was within the Chief Judge's discretion to set a new deadline, which the Secretary met by electronically filing the penalty petition with the Commission and serving the penalty petition on Respondent via email on January 18, 2022. Respondent is not entitled to summary decision as a matter of law because there is no issue of material fact that the Secretary filed the petition and served Respondent by the deadline set by the Chief Judge.

I will not revisit the validity of the Chief Judge's Order. The Chief Judge had jurisdiction and control over this case when Respondent filed its Notice of Contest on October 4, 2021, until February 14, 2022, when the case was assigned to me.[3] While the case was under his jurisdiction and control, the Chief Judge, citing "good cause having been shown," saw fit to grant the Secretary's motion for an extension of time to file the penalty petition. Although Respondent continues to dispute the validity of the Chief Judge's Order, the issue was appealed and, on January 4, 2022, the Commission declined to grant the petition for discretionary review and the Fifth Circuit subsequently dismissed Respondent's appeal. Unlike the Commissioners, I do not sit in a position of review. Accordingly, I decline to review the Chief Judge's order.

Moreover, principals of the "law of the case doctrine" dictate that, absent extraordinary circumstances, courts should be loathe to overturn prior decisions of their own or those of a coordinate court, i.e., the Chief Judge. *Christianson v. Colt Industries Operating Corp.*, 486

[2] Although other issues, such as the appropriateness of the previous stay and my ability to rule on the motion during the pendency of the appeal, were raised in Respondent's motion, those issues are moot and not addressed in this order.

[3] The Secretary cites the Supreme Court's decision in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 209 (1994), for the proposition that "actions before the Commission are initiated not by the Secretary but by a mine operator who claims to be aggrieved." I previously found Commission jurisdiction began when the Notice of Contest was filed. Cactus Canyon Quarries Inc., 44 FMSHRC 353, 354 (April 2022) (ALJ). Accordingly, the Chief Judge properly had jurisdiction over this case at the time he issued his December 1, 2021 order.

U.S. 800, 817 (1988).[4] Here, nothing in the record suggests extraordinary circumstances exist that would warrant revisiting the Chief Judge's determination that good cause existed for granting an extension of time to file beyond the 45-day limit set forth in Commission Procedural Rule 28(a).[5]

Commission case law makes clear that the 45-day time limit is not a statute of limitations. *Salt Lake* at 1715-1716; *Rhone-Poulenc of Wy. Co.*, 15 FMSHRC 2089, 2092-2093 (Oct. 1993). Further, when adequate cause is shown for a delay in filing a penalty, absent evidence of actual prejudice, procedural irregularities are subservient to the substantive purpose of the Mine Act to protect miners. *Long Branch Energy*, 34 FMSHRC 1984, 1990-1991 (Aug. 2012) ("The requirement in Rule 28(a) to file a penalty petition within 45 days cannot be viewed as an avenue for an operator to seek dismissal on a mere technicality.")

Here, the Chief Judge found good cause to grant the Secretary's motion for an extension of time to file the penalty petition. Moreover, Respondent alleged no actual prejudice. Given the absence of extraordinary circumstances or actual prejudice, I see no reason to revisit what was already decided by the Chief Judge and unsuccessfully appealed.

Given that the Chief Judge's order must stand, the only questions that remain are whether the Secretary timely filed the penalty petition and served Respondent by the date set forth in the Chief Judge's Order.

The Secretary timely filed the penalty petition with the Commission. Commission Procedural Rule 5 states that documents filed via electronic transmission are "effective upon successful receipt by the Commission." 29 C.F.R. § 2700.5(f). An email dated January 18, 2022, from FMSHRC's eCMS system confirms the penalty petition was timely received by the Commission. Sec'y Resp. Ex. I. I find that the Secretary timely filed the penalty petition in accordance with deadline set forth in the Chief Judge's Order.

The Secretary timely served the penalty petition upon Respondent. Commission Procedural Rule 7 permits service via electronic mail and provides "service is effective upon successful receipt by the party intended to be served." 29 C.F.R. § 2700.7(c). The Certificate of

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[4] The law of the case doctrine "expresses the practice of courts generally to refuse to reopen what has been decided[.]" *Christianson* at 817 (quoting *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)). I note the Sixth Circuit Court of Appeals has held that "a transferee judge ought as a practical matter to accord considerable deference to the judgment of the transferor court[,]" *In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.*, 664 F.2d 114, 120 (6th Cir. 1981), and as "[a]pplied to coordinate courts, the [law of the case] doctrine is a discretionary tool available to a court in order to promote judicial efficiency. As such, a decision to reconsider a previously decided issue will be deemed erroneous only if it is shown that the transferee court abused its discretion." *U.S. V. Todd*, 920 F.2d 399, 403 (6th Cir. 1990).

[5] Commission Procedural Rule 28(a) states that "[w]ithin 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for assessment of penalty." 29 C.F.R. § 2700.28(a).

Service included with the penalty petition indicates the Secretary emailed the penalty petition on January 18, 2022. Moreover, an email dated the same date confirms the Secretary sent a digital copy of the penalty petition to Respondent.[6] Sec'y Resp. Ex. J. I find that the Secretary timely served the penalty petition in accordance with deadline set forth in the Chief Judge's Order.

For the reasons stated above, Respondent's Motion for Summary Decision seeking dismissal of this case is **DENIED**.[7]

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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[6] The record demonstrates that on January 18, the Secretary emailed the penalty petition to the official email address for Respondent and also emailed a copy to Andy Carson, counsel for Respondent.

[7] Commission Procedural Rule 67(b) states that the Court may grant summary decision where the "entire record…shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. §2700.67(b).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 26, 2022

ADMINISTRATIVE LAW JUDGE HEARINGS ORDER

Glynn F. Voisin, Chief Administrative Law Judge:

Federal Mine Safety and Health Review Commission Administrative Law Judges are committed to a high standard to protect the health and safety of all persons who may appear before them, during the Coronavirus 2019 (COVID-19) pandemic, while continuing the agency's mission. As of January 3, 2022, the Commission has resumed in-person hearings, but for the duration of this order all hearings are subject to its terms.

Commission Judges may, at their sole discretion, hold remote hearings (e.g. via Zoom) and in-person hearings. Judges also have the discretion to hold a hybrid hearing, that includes both in-person and video participation. Commission Judges shall exercise this discretion within uniform parameters as set forth herein. Each Judge shall determine (1) when to use remote hearings in lieu of in-person hearings and (2) specific safety procedures to be used at a hybrid or in-person hearing.

In determining the type of hearing, Judges will consider current guidance and safety factors on a case-by-case basis. Judges will ensure all parties appearing pro se who are required to participate in a remote hearing have access to equipment, an internet connection, and other appropriate technology. Prior to conducting an in-person hearing, Judges will schedule a conference call with the attorneys and representatives of each of the parties to discuss, among other things, safety considerations for the in-person hearing. Persons who are not comfortable with travel or appearing in person, may request to attend the hearing via remote access (e.g., via Zoom). Judges may discuss the agency's workplace safety plan that outlines travel guidelines, protocols, and safety measures in conjunction with the CDC Community Levels[1].

The Judge will set a hearing location after considering CDC Community Levels using the CDC COVID Data Tracker[2] and the safety and health rules currently in place by the state and local public health entities. Where community levels are HIGH, Judges are discouraged from setting in-person hearings. If in-person participants are traveling to attend a hearing, the community levels of where they are traveling from need to be taken into account as well. In choosing a courtroom, the Judge will take into consideration the rules and requirements of the court or hearing facility, as well as all applicable federal, state, and local regulations and guidelines. If the hearing is to be a hybrid hearing, the Judge will also consider the availability of internet and technology needs in the courtroom.

[1] See https://www.cdc.gov/coronavirus/2019-ncov/science/community-levels.html

[2] See https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=all_states&list_select_county=all_counties&data-type=CommunityLevels

During the prehearing conference, the Judge will consider federal, state, local and courtroom requirements and inform the parties of such requirements. The requirements apply to all persons attending the in-person hearing. The discussion will also address who may enter the courtroom, when, and what safety measures, such as masks and physical distancing, must be implemented. No person may enter the courtroom, or the witness room without the permission of the Judge.

In addition to any federal, state, local and facility safety and health rules, all persons attending in-person hearings are also subject to the below requirements:

- **FMSHRC employees:**
  - All FMSHRC employees must adhere to the agency's workplace safety plan, diagnostic testing policy, and CDC guidance on physical distancing, mask wearing, isolation in the event of symptoms or a positive test result, and official travel requirements.
- **Visitors, Contractors, Non-government Parties, Representatives and Witnesses:**
  - Contractors, for purposes of this order, are defined as individuals who have been contracted by FMSHRC to attend an in-person hearing for a specific purpose (e.g. a court reporter creating a transcript).
  - Visitors, Contractors, Non-government Parties, Representatives and Witnesses who attend an in-person hearing must adhere to the agency's workplace safety plan and CDC guidance on physical distancing, mask wearing, and isolation in the event of symptoms or a positive test result. When CDC Community Levels are MEDIUM or HIGH, the same individuals must complete the COVID-19 Symptom Screening Tool form before entering a facility where an in-person hearing will be held. [3]

The Judge may consider all factors, in totality, in determining if a remote hearing will be held and who may be present for the hearing. No single factor is dispositive.

These procedures shall remain in place until this order is vacated or otherwise modified by subsequent order.

SO ORDERED.

/s/ Glynn F. Voisin
Glynn F. Voisin
Chief Administrative Law Judge

[3] The FMSHRC COVID-19 Screening Tool form is available in Appendix C of the agency's workplace safety plan. Individuals who plan to attend a hearing can also obtain a copy of the form by contacting a Judge's office.