November 2020

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COMMISSION ORDERS

No review was granted or denied during the month of November 2020.

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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November 4, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. DELHUR INDUSTRIES, INC.	Docket No. CENT 2020-0099-M A.C. No. 45-03093-504693

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On March 16, 2020, the Commission received from DelHur Industries, Inc. ("DelHur") 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 December 11, 2019, and became a final order of the Commission on January 10, 2020. DelHur contends that it never received the proposed penalty assessment and was not aware of the assessment until it received MSHA's delinquency notice, which was sent on February 25, 2020. Upon receipt of MSHA's

delinquency notice, DelHur contacted MSHA, which directed the operator to contact the Commission. DelHur then filed this motion to reopen the final penalty assessment. 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 DelHur's request and the Secretary's response, we find that DelHur failed to timely contest penalties through inadvertence or mistake, and that such inadvertence or mistake constitutes good cause to reopen the penalty proceeding. 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/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

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

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November 4, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CALLENDER CONSTRUCTION COMPANY, INC.	Docket No. LAKE 2020-0092-M A.C. No. 11-00214-495359

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On February 19, 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).

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 July 8, 2019, and became a final order of the Commission on August 7, 2019. Callender contends that it never received the

proposed penalty assessment. On September 23, 2019, MSHA sent a delinquency notice to Callender. 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 Callender's request and the Secretary's response, we find that Callender failed to timely contest penalties through inadvertence or mistake, and that such inadvertence or mistake constitutes good cause to reopen the penalty proceeding. 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/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

/s/ Arthur R. Traynor, III
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November 4, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. BUCHANAN MINERALS, LLC	Docket No. VA 2020-0009 A.C. No. 44-04856-496824

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On November 12, 2019, the Commission received from Buchanan Minerals, LLC ("Buchanan") 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 9, 2019, and became a final order of the Commission on September 9, 2019. Buchanan's Safety Manager, who is responsible for reviewing and processing the proposed penalty assessment form, never received

the subject form. Under Buchanan's normal procedures, the form is delivered to the Post Office, and signed for by the security guard, who would deliver the mail by placing it in corresponding mailboxes at the mine office. The mine superintendent, to whom the form is addressed, would then hand deliver it to the Safety Manager for processing, but the Safety Manager never received the subject proposed assessment. On October 24, 2019, MSHA sent a delinquency notice to Buchanan. Upon receipt of MSHA's delinquency notice, Buchanan promptly filed a motion to reopen the final penalty assessment. 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 Buchanan's request and the Secretary's response, we find that Buchanan failed to timely contest penalties through inadvertence or mistake, and that such inadvertence or mistake constitutes good cause to reopen the penalty proceeding. 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/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

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

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November 4, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. VA 2020-0021 A.C. No. 46-09414-501548
COMMONWEALTH MINING, LLC	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On January 8, 2020, the Commission received from Commonwealth Mining, LLC ("Commonwealth") 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 October 15, 2019, and became a final order of the Commission on November 14, 2019. Commonwealth, through its representative, claims that it did not receive the proposed assessment, but that it intended to contest the four citations included in the proposed assessment. It states that it has instituted procedures and provided training to avoid future occurrence. On December 30, 2019, MSHA

sent a delinquency notice to Commonwealth. Upon receipt of MSHA's delinquency notice, Commonwealth's representative promptly filed a motion to reopen the final penalty assessment. The Secretary confirms that the proposed penalty assessment was delivered to Commonwealth's address of record. However, he does not oppose the request to reopen and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Commonwealth's request and the Secretary's response, we find that Commonwealth failed to timely contest penalties through inadvertence or mistake, and that such inadvertence or mistake constitutes good cause to reopen the penalty proceeding. 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/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

/s/ Arthur R. Traynor, III
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November 4, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2019-0278-M A.C. No. 02-00024-480570
FREEPORT-MCMORAN MORENCI INC.	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On April 17, 2019, the Commission received from Freeport-McMoRan Morenci Inc. ("Freeport") 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 14, 2019, and became a final order of the Commission on February 13, 2019. During that time, Freeport alleges that it was short-staffed due to the resignation of two employees in its industrial hygiene program and that its Superintendent for Health & Safety, who is responsible for reviewing

MSHA's proposed assessments, was also covering the tasks of the industrial hygiene program. Freeport believed it had followed its typical procedure, which is to forward proposed assessments it intends to contest to outside counsel. However, on April 4, 2019, having failed to timely contest or pay the assessment, MSHA sent a delinquency notice to Freeport. Upon receipt of MSHA's delinquency notice, Freeport's Superintendent promptly sent the notice to its outside counsel who also promptly filed a motion to reopen the final penalty assessment. 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 Freeport's request and the Secretary's response, we find that Freeport failed to timely contest penalties through inadvertence or mistake, and that such inadvertence or mistake constitutes good cause to reopen the penalty proceeding. 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/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

/s/ Arthur R. Traynor, III
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November 4, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2019-0517-M A.C. No. 45-03762-492304
EIGER MOUNTAIN CRUSHING, L.L.C.	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On August 30, 2019, the Commission received from Eiger Mountain Crushing, L.L.C. ("Eiger") 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 3, 2019, and became a final order of the Commission on July 3, 2019. Counsel for Eiger claims that the operator believed that it had timely contested the proposed assessment via certified mail to the correct MSHA address and provided documentation of the certified mail return receipt. On August 19, 2019, MSHA sent a delinquency notice to Eiger, thereby alerting the operator that MSHA had

not timely received its contest. Upon receipt of MSHA's delinquency notice, counsel for Eiger promptly filed a motion to reopen the final penalty assessment. 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 Eiger's request and the Secretary's response, we find that Eiger failed to timely contest penalties through inadvertence or mistake, and that such inadvertence or mistake constitutes good cause to reopen the penalty proceeding. 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/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

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

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November 4, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2020-0156-M A.C. No. 48-00152-503109
GENESIS ALKALI, LLC	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On January 15, 2020, the Commission received from Genesis Alkali, LLC ("Genesis") 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 November 5, 2019, and became a final order of the Commission on December 5, 2019. Genesis contends that due to a temporary change in its administrative staff, it inadvertently sent its contest of the proposed assessments for Citation Nos. 9348735 and 9348741, along with its payment for the remaining violations on the same proposed assessment, to MSHA's St. Louis address instead of its Arlington office. After checking MSHA's Data Retrieval System on December 29, 2019,

Genesis discovered that the two citations it intended to contest were pending payment. The operator asserts that it notified counsel, who subsequently filed this motion to reopen. The Secretary confirms that Genesis submitted payment and 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 Genesis's request and the Secretary's response, we find that Genesis failed to timely contest penalties through inadvertence or mistake, and that such inadvertence or mistake constitutes good cause to reopen the penalty proceeding. 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/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 18, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. NYRSTAR TENNESSEE MINES, STRAWBERRY PLAINS, LLC	Docket No. SE 2020-0163-M A.C. No. 40-00168-508283

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor states that he does not oppose the motion.

Having reviewed movant's unopposed motion to reopen, we 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. 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/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 18, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. NORTH AMERICAN MILLWRIGHT SERVICES, INC.	Docket No. YORK 2019-0010 A.C. No. 18-00019-476365 N492

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On May 7, 2019, the Commission received from North American Millwright Services, Inc. ("Millwright") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On February 15, 2019, the Chief Administrative Law Judge issued an Order to Show Cause in response to Millwright's perceived failure to answer the Petition for Assessment of Civil Penalty, mailed by the Secretary of Labor on December 7, 2018. By its terms, the Order to Show Cause was deemed a Default Order on March 4, 2019, when it appeared that the operator had not filed an answer within 15 days.

The penalties became delinquent on April 4, 2019, but the operator paid the assessment in full on August 15, 2019. The Secretary does not oppose the request to reopen, but requests that Millwright, having contested the penalty at issue, take its further obligations seriously.

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 Millwright's request and the Secretary's response, we find that Millwright's request to reopen, filed approximately 30 days after the penalties became delinquent, its payment of the penalty assessment, and the Secretary's non-opposition, demonstrate the operator's good faith, and merit reopening of the case. 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/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

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November 18, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. O&G INDUSTRIES, INC.	Docket No. YORK 2020-0048-M A.C. No. 06-00295-502126

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor states that he does not oppose the motion.

Having reviewed movant's unopposed motion to reopen, we 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. 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/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ William I. Althen
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November 20, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. LAKE 2019-0236 A.C. No. 11-02627- 487245
HUBER CARBONATES, LLC	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On April 25, 2019, the Commission received from Huber Carbonates, LLC ("Huber") a motion seeking to permit late filing of its notice of contest of a non-assessable section 104(b) withdrawal order, 30 U.S.C. § 814(b), issued on March 14, 2019. The Commission has decided to construe Huber's motion as a motion to reopen pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary does not oppose the motion.

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 Commission has further held that "a section 104(b) withdrawal order may be contested under section 105(a) in a civil penalty proceeding regardless of whether it was separately contested under section 105(d)." *UMWA v. Maple Creek Mining, Inc*., 29 FMSHRC 583, 591 (July 2007). Our *Maple Creek* holding is consistent with the Commission's procedural

rule, which states that: "An operator's failure to file a notice of contest of a citation or order issued under section 104 of the Act, 30 U.S.C. 814, shall not preclude the operator from challenging, in a penalty proceeding, the fact of violation or any special findings contained in a citation or order . . ." 29 C.F.R. § 2700.21(b). We have held that this regulation plainly permits a challenge to a section 104(b) withdrawal order in the civil penalty proceeding that includes the citation underlying the withdrawal order. *Maple Creek*, 29 FMSHRC at 592.

In the instant case, although Huber has moved to essentially reopen LAKE 2019-236 to permit contest of section 104(b) Order No. 8672913, the record shows that the proposed assessment for underlying Citation No. 8672912 was properly contested and was the subject of Docket No. LAKE 2019-237. As Huber timely contested the penalty assessment for underlying Citation No. 8672912, the assessment was not a final order and reopening LAKE 2019-236 is unnecessary. Moreover, since the filing of this motion to reopen, the Judge assigned to the penalty docket has since issued a decision approving the settlement of underlying Citation No. 8672912, as well as Order No. 8672913.

Because Order No. 8672913 has been resolved, the motion to reopen this case is moot. *See Olmos Contracting 1, LLC*, 39 FMSHRC 2015, 2019 (Nov. 2017) ("As this matter was timely contested and has now been resolved, the motion to reopen this case is moot."); *Kembel Sand & Gravel*, 33 FMSHRC 1153, 1153-54 (June 2011). Accordingly, this motion is dismissed.

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

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

/s/ Arthur R. Traynor, III
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November 20, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. SE 2020-0140 A.C. No. 01-00011-502106
IMERY'S CARBONATES USA, INC.	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On February 26, 2020, the Commission received from Imery's Carbonates USA, Inc. ("Imery") 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), 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).

During an inspection spanning nine weeks from June to August 2019, Imery received 130 citations from the Department of Labor's Mine Safety and Health Administration ("MSHA"). The record indicates that the citations were divided between two proposed assessments. The first assessment was received by Imery on October 1, 2019, and the second was delivered on October 21, 2019. The assessment in question became a final order of the Commission on November 21,

2019. Imery claims that it timely submitted its contest of the citations in two packages, one sent on October 16, 2019, and the other on October 26, 2019. However, the operator asserts, and MSHA has confirmed, that the contests were inadvertently sent along with the payment of the uncontested citations to MSHA's address in St. Louis, Missouri, rather than to Arlington, VA.

Imery claims that it learned of its mistake in early January 2020 when it discovered that MSHA had only processed 40 of the 72 contested citations as "under contest," and that only its first contest package had been forwarded to the Office of Assessments from the St. Louis office.[1] MSHA sent a delinquency notice on January 6, 2020. Imery has not filed any other motions to reopen with the Commission in the last two years. 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 Imery's request and the Secretary's response, we find that the operator inadvertently mailed its contest form to MSHA's St. Louis office along with its uncontested penalty payments. 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/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

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

[1] The citations that were processed as contested by MSHA have been docketed at the Commission under Docket Nos. SE 2020-58 and SE 2020-59. On February 11, 2020, the assigned Administrative Law Judge granted Imery's unopposed Motion to Stay those proceedings pending the outcome of this Motion to Reopen.

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November 20, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2019-0221 A.C. No. 46-02119-481551
INWOOD QUARRY, INC.	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On July 23, 2019, the Commission received from Inwood Quarry, Inc. ("Inwood") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On April 2, 2019, the Chief Administrative Law Judge issued an Order to Show Cause in response to Inwood's perceived failure to answer the Secretary of Labor's February 13, 2019 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on April 23, 2019, when it appeared that the operator had not filed an answer within 20 days.

Inwood claims that it never received the hearing packet and was told by someone at MSHA that the hearing paperwork was delivered to an address at "Rt. 11 South, Inwood, WV," which it states is not an address for the company. MSHA's Operator Information System and the company's MSHA Legal ID Report shows Inwood's principal office address as "Rt. 11 South." The Judge's Show Cause Order was also sent to "Rt. 11 South." The Secretary responds that the Proposed Penalty Assessment was sent to P.O. Box 65, Inwood, WV 25428, which Inwood states is the correct address. However, we note that while the correct address appears on the Proposed Penalty Assessment form, the incorrect address appears in the Certificate of Service for the Penalty Assessment. The Secretary does not oppose the motion to reopen, but urges the operator to ensure that its mailing address is correctly filed with MSHA, that its responses are timely filed, and that Show Cause Orders are taken seriously.

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 Inwood's request and the Secretary's response, 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/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

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

/s/ Arthur R. Traynor, III
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November 30, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. CENT 2020-0017 A.C. No. 41-04147-499677
IMAGE MATERIALS	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On March 17, 2020, the Commission received from Image Materials ("Image") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On January 31, 2020, the Chief Administrative Law Judge issued an Order to Show Cause in response to Image's failure to answer the Secretary of Labor's November 25, 2019 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on February 21, 2020, when it appeared that the operator had not filed an answer within 20 days.

Image asserts that it timely contested the Petition for Assessment of Civil Penalty and that its contest was lost after it was received. It states that on December 23, 2019, its contest was sent to the MSHA Dallas office, and again to the Arlington office on February 5, 2020. 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.

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 Image's request and the Secretary's response, in the interest of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists to excuse Image's failure to respond to the show cause order, and for further proceedings as appropriate.

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

/s/ William I. Althen
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November 30, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. PENN 2020-0022 A.C. No. 36-00271-503052
HOLCIM (US) INC.	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On November 7, 2019, the Commission received from Holcim (US) Inc. ("Holcim") a motion seeking to reopen contest proceedings pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a) for section 104(b) Order Nos. 9464868 and 9464892, issued on September 12, 2019, and September 30, 2019, respectively. The Commission has decided to construe Holcim's motion as a motion to reopen. The Secretary does not oppose.

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 Commission has held that "a section 104(b) withdrawal order may be contested under section 105(a) in a civil penalty proceeding regardless of whether it was separately contested under section 105(d)." *UMWA v. Maple Creek Mining, Inc*., 29 FMSHRC 583, 591 (July 2007).

The record shows that the proposed assessment for Citation No. 9464851, the underlying citation for section 104(b) Order No. 9464868, was issued on May 29, 2020, and properly contested in Docket No. PENN 2020-0084. On August 24, 2020, the Administrative Law Judge in that docket issued a decision approving settlement, which stated that Order No. 9464868 has been vacated by the Secretary. We conclude that the Order was properly contested along with the underlying citation and has been vacated. Therefore, the motion to reopen the contest of this Order is moot.

With regard to Order No. 9464892, the operator first received the proposed penalty assessment for underlying Citation No. 9464877 on November 4, 2019, and three days later filed its motion to reopen on November 7, 2019. In its motion, Holcim specified that it intended to contest Order No. 9464892 along with the underlying citation and penalty. A recent review of the Department of Labor's Mine Safety and Health Administration's ("MSHA") data retrieval system shows, however, that Holcim has paid the proposed civil penalty for underlying Citation No. 9464877. To date, no civil penalties have been proposed for Order No. 9464892, and this Order remains unresolved.

We conclude that this motion to reopen may serve as the operator's timely notice of contest for Order No. 9464892. Therefore, because the operator timely filed its notice of contest, the Order is not a final order of the Commission and the motion to reopen contest of Order No. 9464892 is denied as moot. *Rock N Road Quarry*, 31 FMSHRC 769, 770 (July 2009); *Double Bonus Coal Co*., 31 FMSHRC 358, 360 (Mar. 2009) (holding that statements in motions to reopen could serve as operator's notice of contest, and denying the motions as moot).

Accordingly, we deny Holcim's request regarding Order Nos. 9464868, as the order has been vacated. We also deny the operator's request regarding Order No. 9464892, as the order has not become a final order of the Commission and we remand this matter to the Chief Administrative Law Judge for further proceedings as appropriate, pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

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William I. Althen, Commissioner

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 30, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2019-0082 A.C. No. 45-03175-476571
IRON MOUNTAIN QUARRY, LLC	

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On June 21, 2019, the Commission received from Iron Mountain Quarry, LLC ("Iron Mountain") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On February 19, 2019, the Chief Administrative Law Judge issued an Order to Show Cause in response to Iron Mountain's failure to answer the Secretary of Labor's December 21, 2018 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on March 7, 2019, when it appeared that the operator had not filed an answer within 15 days.

The operator states that when it filed its notice of contest it provided that its counsel, Erik Laiho, should be contacted for all matters related to the contest. Neither the operator nor its counsel have any record of receiving any documents from MSHA after filing its contest. It also notes that it had been having problems with postal deliveries for at least a year surrounding this matter. The Secretary did not provide tracking information or proof that the petition was delivered to the operator. The Secretary does not oppose the motion to reopen.

Iron Mountain asserts that it did not receive the Petition for Assessment of Civil Penalty. It states that after it did not receive any notice of further proceedings following its notice of contest, it reached out to the MSHA Assessment's office and learned on May 23, 2019, that it was in default status. After an internal investigation, the operator could not find any record that the petition had been received. Additionally, Iron Mountain states that it has made multiple complaints to the U.S. Postal Service because of inconsistent mail delivery over the course of a year. There is no proof that the Petition was delivered to the operator. 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.

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 Iron Mountain's request and the Secretary's response, and the record in this case, we find that the Order to Show Cause did not result in a final order of default because it was never served on the operator. Accordingly, the operator's motion is denied as moot, and 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/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ William I. Althen
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November 30, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. YORK 2018-0084 A.C. No. 30-00006-469606 E938
v.	
INDUSTRIAL PROCESS EQUIPMENT CONSTRUCTORS	Docket No. YORK 2019-0013 A.C. No. 30-00006-477928 E938

BEFORE: Rajkovich, Chairman; Althen and Traynor, 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. (2012) ("Mine Act").[1] On June 3 and 4, 2019, the Commission received from Industrial Process Equipment Constructors ("IPEC") motions seeking to reopen the penalty assessment proceedings and relieve it from the Default Orders entered against it.

On February 15, 2019, the Chief Administrative Law Judge issued Orders to Show Cause in response to IPEC's perceived failure to answer the Secretary of Labor's September 6, 2018 and December 18, 2018 Petitions for Assessment of Civil Penalty. By their terms, the Orders to Show Cause were deemed Default Orders on March 4, 2019, when it appeared that the operator had not filed answers within 15 days.

IPEC asserts that the employee responsible for handling these matters mistakenly believed she had 30 days to respond to the Show Cause Orders when it filed its responses on March 13, 2019. During this timeframe, the employee was tending to several ill family members, including her mother who unfortunately passed away on February 7, 2019. The operator had also lost its secretary who would normally work with the employee on these matters, and who would have alerted her to the deadline. 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.

The Judge's jurisdiction in these matters 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

[1] IPEC filed similar motions to reopen relying upon the same reason as a basis for re-opening in two separate dockets. For the limited purpose of addressing the motions to reopen, we hereby consolidate docket numbers YORK 2018-0084 and YORK 2019-0013, which involve similar procedural issues. *See* 29 C.F.R. §2700.12.

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 orders here have become final decisions 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 IPEC's requests and the Secretary's responses, under these circumstances, we find that IPEC's failure to respond to the Judge's show cause orders due to family illness and the corresponding death of her mother amount to inadvertence or excusable neglect. *See Guilmette Brothers Corp*., 22 FMSHRC 803, 804 (July 2000) (granting request to reopen where operator's wife was undergoing cancer surgery); *Northern Kansas Rock, Inc*., 22 FMSHRC 486, 487-88 (Apr. 2000) (granting request to reopen where the operator failed to timely file because husband was undergoing medical treatment and surgery); *Tigue Construction Co*., 21 FMSHRC 9, 10-11 (Jan. 1999) (granting operator's request where its vice president, who was the employee responsible for answering charges, unexpectedly underwent quadruple bypass surgery); *KenAmerican Resources, Inc*., 20 FMSHRC 199, 200-01 (Mar. 1998) (reopening proceedings where operator's safety director, who routinely handles MSHA violations, was home recovering from surgery).

In the interest of justice, we hereby reopen these proceedings and vacate the Default Orders. Accordingly, these cases are 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/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ William I. Althen
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