

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 16, 2023

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2022-0295
v.	:	A.C. No. 04-01915-551153
	:	
WAYNE J. SAND & GRAVEL, INC.	:	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, 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 1, 2022, the Commission received from Wayne J. Sand & Gravel, Inc. (“WJSG”) 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).

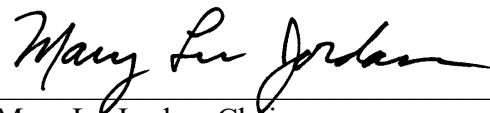
Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on April 10, 2022, and became a final order of the Commission on May 10, 2022. WJSG asserts it never received the mailed

proposed assessment and notes the operation's remote location. After receiving a delinquency notice on June 28, 2022, the operator requested a copy of the proposed assessment on July 19, and submitted its notice of contest (by fax) the same day. 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.

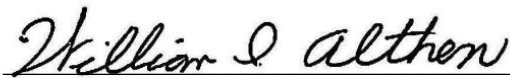
Tracking data from the United States Postal Service indicates the assessment package was delivered to a California Post Office and marked available for pickup on March 18, 2022, then sent back to its facility of origin on April 4. The Secretary asserts the assessment was finally delivered on April 10, but was not signed for. It is unclear whether WJSG's failure to receive the assessment package was the result of a USPS mail processing error (e.g. incorrect address) or operator error (e.g. failure to regularly check a P.O. Box).

We strongly encourage the operator to enact procedures to ensure mail is timely received despite the operation's remote location, such as regularly checking P.O. Boxes and ensuring personnel are available to sign for packages. Future motions to reopen may not be granted where a notice of contest is untimely due to inadequate mail receipt procedures.

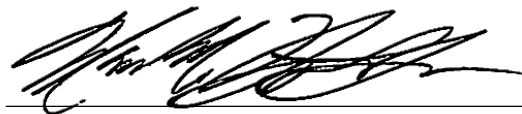
Ultimately, however, having reviewed WSJG's request and the Secretary's response, we find that the delay in this instance was excusable. We note that, due to a mail processing error, WSJG did not timely receive the proposed assessment. Furthermore, WSJG promptly acted to file its notice of contest once it became aware of the issue. 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.



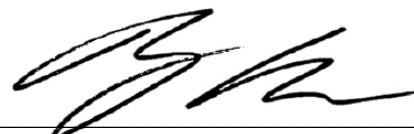
Mary Lu Jordan, Chair



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner



Timothy J. Baker, Commissioner

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