

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 11, 2025

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

v.

DRAKE CEMENT, LLC

Docket No. WEST 2025-0144
A.C. No. 02-03243-609564

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

ORDER

BY: Jordan, Chair, and Baker, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) (“Mine Act”). On January 17, 2025, the Commission received from Drake Cement, LLC, 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 12, 2024, and became a final order of the Commission on December 12, 2024.

Drake Cement asserts that it intended to contest ten of the twenty-three citations in the proposed assessment, but mistakenly mailed the paperwork to the wrong address. Contest paperwork must be mailed to MSHA’s Civil Penalty Compliance Office in Washington, D.C. or emailed to MSHA-PenaltyContests@dol.gov, while payments for uncontested citations must be mailed to MSHA’s Lock Box in St. Louis, Missouri. On December 10, 2024, the operator’s Health & Safety Manager mailed its contest form to the St. Louis address along with payment for the uncontested citations.¹ The Health & Safety Manager, who was new to his role and had not previously processed a penalty contest, mistakenly believed the Compliance Office would forward the contest form to the correct office. He realized the penalties had not been timely contested on January 14 when he checked MSHA’s Mine Data Retrieval System and on January 16 when MSHA’s field office called regarding the assessment. He forwarded the assessment to outside counsel on January 16, and counsel moved to reopen the next day. The Secretary does not oppose the operator’s request to reopen.

We note that Drake Cement attempted to timely contest the proposed assessment. The contest form was mailed on December 10, 2024, before the assessment became final. While the form was mailed to the wrong address, this appears to be the Health & Safety Manager’s first and only such error. We also note that the operator proactively checked the status of the citations it wished to contest, and promptly moved to reopen a few days after learning that the assessment had become final. *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (motions received within 30 days of an operator’s first notice from MSHA that it has failed to timely file a notice of contest have presumptively been filed within a reasonable amount of time).

Having reviewed Drake Cement’s request and the Secretary’s response, we find that Drake Cement’s failure to timely contest the assessment was the result of inadvertence. We also note that the operator acted in good faith by timely filing its request 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.



Mary Lu Jordan, Chair



Timothy J. Baker, Commissioner

¹ The Secretary represents that MSHA applied part of Drake Cement’s payment to Citation Nos. 9909312, 9909174 and 9909176 as an “administrative function.” While three of the citations that the operator seeks to reopen have been paid, the Secretary represents that this administrative application of Drake Cement’s payment should not render the motion to reopen moot. Resp. at 2 n.2.

Commissioner Marvit, dissenting:

I write to disagree with the Majority in this case for the reasons set forth below.

In *Explosive Contractors*, 46 FMSHRC 965 (Dec. 2024), I dissented and explained that Congress did not grant the Commission the authority to reopen final orders under section 105(a) of the Mine Act. The Commission’s repeated invocation of Federal Rule of Civil Procedure 60(b) cannot overcome the statutory language. However, in *Belt Tech*, I explained in my concurrence that “the Act clearly states that to become a final order of the Commission, the operator must have received the notification from the Secretary.” 46 FMSHRC 975, 977 (Dec. 2024) (citing *Hancock Materials, Inc.*, 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

In the instant case, as the Majority recounts, the Commission’s order became final under the language of section 105(a). The Majority, however, votes to reopen the case. The Mine Act has not granted us authority to reconsider final orders of the Commission as I set out more fully in *Explosive Contractors*. To the contrary, it has limited our authority to do so. Therefore, I respectfully dissent and would deny reopening.

A handwritten signature in black ink, appearing to read 'Marvit', written over a horizontal line.

Moshe Z. Marvit, Commissioner

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