

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

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.



Marco M. Rajkovich, Jr., Chairman



William I. Althen, Commissioner



Arthur R. Traynor, III, Commissioner

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