FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

April 14, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CONSOL MINING COMPANY, LLC	Docket No. WEVA 2024-0307[1]

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

ORDER

BY: Jordan, Chair, and Baker, 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 May 23, 2024, the Commission received from Consol Mining, LLC ("Consol") a motion seeking to reopen a contest proceeding involving a non-assessable section 104(b) withdrawal order, 30 U.S.C. § 814(b), issued on January 18, 2024. The Secretary does not oppose the motion.

Under section 105(d), an operator who wishes to contest a section 104(b) withdrawal order should notify the Secretary within 30 days after receipt of the order. Alternatively, the Commission has allowed operators to contest 104(b) orders as part of its contest of the underlying section 105(a) civil penalty proceeding. *Holcim (us) Inc*., 42 FMSHRC 897, 897 (Nov. 2020), *citing UMWA v. Maple Creek Mining, Inc*., 29 FMSHRC 583, 591 (July 2007); *Huber Carbonates, LLC*, 42 FMSHRC 885, 885–86 (Nov. 2020) ("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.") (internal citation omitted).

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, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as

[1] The Secretary moves that the Commission amend the caption in this case to remove "A.C. No. 46-09569-544722," because there is no associated penalty assessed for Order No. 9590373. Therefore, the A.C. Number is not applicable here. In light of the facts presented, the Secretary's motion is granted.

practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (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 permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Section 104(b) Order No. 9598373 was issued on January 18, 2024. Shortly thereafter, Consol requested a conference with MSHA, which was held on February 14, 2024. During the conference, Consol contested the facts asserted in the Order, and MSHA notified Consol that "[p]articipation in this conference did not waive your right to a formal hearing with the Federal Mine Safety and Health Review Commission concerning these citations…" As such, Consol believed that Order No. 9598373 and the forthcoming penalty assessment would be contested when the underlying citation was assessed. However, to the surprise of Consol, when the penalty assessment was issued, there was no penalty assessed for the order, nor was the order included in the petition. The order was only referenced in Exhibit A to the Petition. At some point following the conference, mine personnel were informed by the Secretary that Order No. 9598373 had become a final order because it was not contested within 30 days. Consol consulted with outside counsel and filed its motion to reopen.

Consol maintains that its failure to contest the section 104(b) Order constitutes mistake, inadvertence, and excusable neglect, because its personnel were not aware that MSHA does not always assess a penalty for 104(b) Orders and does not process them with the underlying citation, or that they would become final within 30 days. It argues that Consol fully intended to contest Order No. 9598373, which is evidenced by the fact that it requested a conference soon after the Section 104(b) Order was issued. Consol contends that it is unfair that the order would become final before the conference to resolve the order could even occur. The operator notes that it timely contested the underlying citation and is currently engaged in settlement discussions with the Secretary regarding the underlying violation. Consol states that to reduce the possibility of mistakes in the future, it will contest any 104(b) Orders within 30 days. The Secretary does not oppose the motion, noting pending settlement negotiations, but reminds Consol to ensure that future contests are timely filed in accordance with MSHA's regulations at 30 C.F.R. § 100.7 and the Commission's procedural rules.

The record shows that the proposed penalty assessment for underlying Citation No. 9598358 was issued on February 13, 2024, and properly contested by the operator on March 3, 2024, and is the subject of Docket No. WEVA 2024-0200. The Secretary did not assess a penalty for Order No. 9590373. Moreover, the parties have notified the assigned ALJ of an impending settlement in Docket No. WEVA 2024-0200 and Order No. 9590373.[2]

Having reviewed Consol's request and the Secretary's response, we find that the operator has sufficiently explained its failure to timely contest the citations at issue as the result of mistake, inadvertence, and excusable neglect. *See Oak Grove Res*., *LLC*, 42 FMSHRC 915, 916 (Dec. 2020). In the interest of justice, we hereby reopen this matter and remand it to the Chief

[2] The ALJ has stayed the proceedings in Docket No. WEVA 2024-0200 pending resolution of the operator's motion to reopen in the present docket. *See* ALJ Order Staying Proceedings of June 14, 2024, WEVA 2024-0200.

Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chair

Timothy J. Baker, Commissioner

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 (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.

Moshe Z. Marvit, Commissioner

Distribution:

James P. McHugh, Esq.
Christopher D. Pence, Esq.
Pence Law Firm PLLC
10 Hale Street, 4th Floor
P.O. Box 2548
Charleston, WV 25329-2548
jmchugh@pencefirm.com
cpence@pencefirm.com

Thomas A. Paige, Esq.
Deputy Associate Solicitor
US Department of Labor
Office of the Solicitor
Division of Mine Safety and Health
200 Constitution Avenue NW, Suite N4428
Washington, DC 20210
Paige.Thomas@dol.gov

Melanie Garris
US Department of Labor/MSHA
Office of Assessments, Room N3454
200 Constitution Ave NW
Washington, DC 20210
Garris.Melanie@DOL.GOV

Chief Administrative Law Judge Glynn F. Voisin
Office of the Chief Administrative Law Judge
Federal Mine Safety Health Review Commission
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov