

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

June 3, 2024

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 2023-0313
	:	A.C. No. 05-04889-577315
HOLCIM – WCR, INC.	:	

BEFORE: Jordan, Chair; Althen, Rajkovich, Baker, and Marvit, 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 July 13, 2023, the Commission received from Holcim-WCR, Inc. (“Holcim”) 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).


The Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicates that the proposed assessment was delivered to the operator on May 22, 2023. The assessment became a final order of the Commission on June 21, 2023.

Holcim asserts that its internal office procedure requires routing of proposed civil penalty assessments to its Regional Health and Safety Manager for evaluation and contest determinations. It contends that the assessment here was not routed to the Safety Manager upon receipt due to an inadvertent internal routing error. Holcim learned of the proposed civil penalty assessment on June 28, 2023, when the Safety Manager saw the assessment on MSHA’s data retrieval system. The operator maintains that it was intending to contest Order No. 9729218 and the associated civil penalty. It states that it began the process to reopen the order prior to any notification from MSHA and as soon as the mistake was discovered. Holcim also claims that it took steps to modify its internal routing procedure to streamline the procedure and to prevent routing errors in the future. The operator argues that surrounding circumstances demonstrate that its failure to timely contest was “the result of an inadvertent and rare routing error and oversight.” Holcim MTR at 4. It also contends that no one will be prejudiced by acceptance of a late contest in this case as the delay is not significant.

The Secretary opposes the motion arguing that not only did Holcim miss the deadline to contest the specific order, but it also neglected to pay the penalty amounts for all five citations contained in the assessment.¹ She states that as a mine operator, Holcim should be familiar with the processing of proposed assessments—especially when they involve significant and substantial (“S&S”) violations. The Secretary argues that the operator’s failure, which took more than a month to discover, is not excusable neglect and the assessments must be taken seriously and handled with care. She contends that Holcim’s reason that its failure was the result of an “internal routing error” is vague and gives no explanation as to why it was a routing error, or how it happened. In addition, Holcim does not explain what changes were made to fix the error, and what procedures will be employed to ensure proper and timely handling of MSHA communications in the future. The Secretary maintains that Holcim has failed to provide a viable justification for its failure to timely contest the assessment, thus, its motion should be denied without prejudice.

¹ The operator has since paid the associated civil penalties.

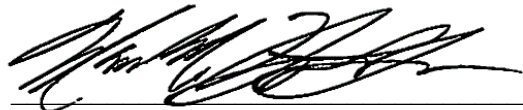
Here, Holcim discovered its error by proactively checking MSHA's mine data retrieval system and immediately moved to reopen the case within 30 days of the final order. The operator also does not have a lengthy history of filing motions to reopen. Therefore, having reviewed Holcim's request and the Secretary's response, we find that due to an administrative error, the penalty assessment was not timely contested. 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.



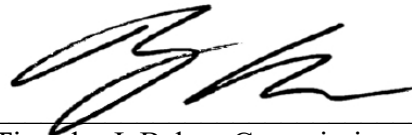
Mary Lu Jordan, Chair



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner



Timothy J. Baker, Commissioner



Moshe Z. Marvit, Commissioner

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