

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 12, 2011

LAFARGE NORTH AMERICA, INC.	:	
	:	
v.	:	Docket No. LAKE 2010-481-M
	:	Docket No. LAKE 2010-22-RM
	:	Docket No. LAKE 2010-23-RM
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA)	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”).<sup>1</sup> On June 21, 2011, the Commission received a motion by counsel for LaFarge North America, Inc., (“LaFarge”) in Docket Nos. LAKE 2010-22-RM and LAKE 2010-23-RM requesting that those contest proceedings be reopened “due to mistake and clerical error.” On June 3, 2011, Chief Judge Lesnick had dismissed the operator’s section 105(d) contests of Citation No. 6403907 and Order No. 6403908, which had been docketed as Nos. LAKE 2010-22-RM and LAKE 2010-23-RM, respectively. These contest cases had previously been stayed pending the assessment of the proposed penalties. The contest proceedings were dismissed because the Judge believed that the operator had failed to file an answer in the civil penalty proceeding involving the same citation and order and was therefore in default. That civil penalty proceeding had been docketed as No. LAKE 2010-481-M.

We treat LaFarge’s motion to rescind dismissal of the contest proceedings (Nos. LAKE 2010-22-RM and LAKE 2010-23-RM) as a petition for discretionary review and grant it. We conclude that, because LaFarge had filed an answer in the civil penalty proceeding (No. LAKE

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate Docket Nos. LAKE 2010-481-M, LAKE 2010-22-RM, and LAKE 2010-23-RM, all captioned *LaFarge North America, Inc.*, and involving similar issues. 29 C.F.R. § 2700.12.

2010-481-M), the contest proceedings should not have been dismissed. We also construe the motion as a request to reopen the civil penalty proceeding.

On March 16, 2011, Chief Judge Lesnick had issued an Order to Show Cause and Default Order in the civil penalty proceeding. The order stated that a timely answer to the Secretary's petition for civil penalty had not been received by the Commission. Accordingly, LaFarge was ordered to file an answer within 30 days. Under the terms of the order, a failure to file an answer would automatically place the case in default on the 31st day.

Subsequently, the file in No. LAKE 2010-481-M did not indicate that an answer from LaFarge in response to the show cause order was ever received. As a result, the civil penalty proceeding was automatically placed in default status and the proposed penalties for the citation and order became final orders of the Commission.

In evaluating requests to reopen final section 105(a) 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 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).

In its motion to rescind dismissal received on June 21, 2011, LaFarge contends that the judge's dismissal of the contest proceedings was in error, because it had timely filed an answer in No. LAKE 2010-481-M with the Commission within 30 days of receipt of the petition for assessment of civil penalty. LaFarge attached a copy of the answer and a signed certificate of service dated March 29, 2010. We accept the representation of counsel for LaFarge that the answer was sent.

Having reviewed the facts and circumstances of these cases, we hereby reopen the civil penalty and contest proceedings and remand them 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. We also vacate the June 3, 2011, order dismissing the contest proceedings.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

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