

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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March 23, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. SE 2007-154-M
	:	A.C. No. 22-00313-101052
v.	:	
	:	
HOLCIM (US) INCORPORATED	:	

BEFORE: Duffy, Chairman; Jordan and Young, 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. (2000) (“Mine Act”). On February 8, 2007, the Commission received from Holcim (US) Incorporated (“Holcim”) a motion by counsel 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). On March 9, 2007, Holcim filed an amended motion to reopen.

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).

On May 2, 2006, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a citation and order to Holcim. On May 17, Holcim timely filed notices of contest of the citation and order, and the assigned judge stayed those cases pending the docketing and assignment of the related civil penalty case. Holcim states that, following the contest of the citation and order, it was never served the “civil penalty proposal,” or that, if it was, it was unaware of the civil penalty proposal and has no record of ever having received it. Holcim learned of the penalty when it received a delinquency notice from MSHA’s Civil Penalty Compliance Office.

On February 23, 2007, the Secretary filed her Response to the Motion to Request to Reopen. In her response, she states that her records indicate that proposed assessments were sent to Holcim on October 18, 2006, but that they were never contested. The Secretary continues that, if Holcim failed to timely contest the assessments, then it should explain why it is entitled to relief.<sup>1</sup>

We have held 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 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 inadvertence or mistake. *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).

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<sup>1</sup> The Secretary also requests that the Commission direct Holcim to specify whether it filed timely contests to the “penalty assessments,” rather than the “penalty petition,” which was referred to in Holcim’s initial motion to reopen. However, in its amended motion to reopen, Holcim has clarified that its reference to “penalty petition” in the original motion should have been to “penalty proposal.”

Having reviewed Holcim's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Holcim's failure to timely contest the proposed penalty assessments and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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