

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

November 20, 2020

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. LAKE 2019-0236
 : A.C. No. 11-02627- 487245
HUBER CARBONATES, LLC :

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 April 25, 2019, the Commission received from Huber Carbonates, LLC (“Huber”) a motion seeking to permit late filing of its notice of contest of a non-assessable section 104(b) withdrawal order, 30 U.S.C. § 814(b), issued on March 14, 2019. The Commission has decided to construe Huber’s motion as a motion to reopen pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary does not oppose the motion.

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).

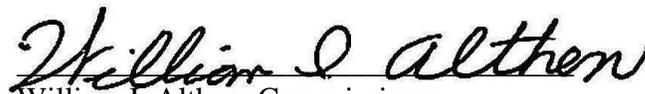
The Commission has further held that “a section 104(b) withdrawal order may be contested under section 105(a) in a civil penalty proceeding regardless of whether it was separately contested under section 105(d).” *UMWA v. Maple Creek Mining, Inc.*, 29 FMSHRC 583, 591 (July 2007). Our *Maple Creek* holding is consistent with the Commission’s procedural rule, which states that: “An operator’s failure to file a notice of contest of a citation or order issued under section 104 of the Act, 30 U.S.C. 814, shall not preclude the operator from challenging, in a penalty proceeding, the fact of violation or any special findings contained in a citation or order . . .” 29 C.F.R. § 2700.21(b). 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. *Maple Creek*, 29 FMSHRC at 592.

In the instant case, although Huber has moved to essentially reopen LAKE 2019-236 to permit contest of section 104(b) Order No. 8672913, the record shows that the proposed assessment for underlying Citation No. 8672912 was properly contested and was the subject of Docket No. LAKE 2019-237. As Huber timely contested the penalty assessment for underlying Citation No. 8672912, the assessment was not a final order and reopening LAKE 2019-236 is unnecessary. Moreover, since the filing of this motion to reopen, the Judge assigned to the penalty docket has since issued a decision approving the settlement of underlying Citation No. 8672912, as well as Order No. 8672913.

Because Order No. 8672913 has been resolved, the motion to reopen this case is moot. *See Olmos Contracting 1, LLC*, 39 FMSHRC 2015, 2019 (Nov. 2017) (“As this matter was timely contested and has now been resolved, the motion to reopen this case is moot.”); *Kembel Sand & Gravel*, 33 FMSHRC 1153, 1153-54 (June 2011). Accordingly, this motion is dismissed.



Marco M. Rajkovich, Jr., Chairman



William I. Althen, Commissioner



Arthur R. Traynor, III, Commissioner

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