

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 1, 2025

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

v.

CARMEUSE LIME AND STONE, INC.

Docket No. LAKE 2024-0255
A.C. No. 12-00426-600941

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

ORDER

BY: Jordan, Chair, and Baker, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On September 3, 2024, the Commission received from Carmeuse Lime and Stone, Inc. (“Carmeuse”) 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) 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).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on June 12, 2024. Carmeuse

timely contested seven of the forty-three citations listed in the assessment.¹ The assessment associated with the remaining thirty-six citations became a final order of the Commission on July 12, 2024. Carmeuse now seeks to reopen Citation No. 9781125.²

Carmeuse asserts that it always intended to contest Citation No. 9781125, but the citation was inadvertently omitted due to a mistake by outside counsel. Carmeuse explains that on June 20, 2024, its Senior Area Health and Safety Manager emailed its outside counsel a draft contest form with eight citations marked for contest. The accompanying email mistakenly stated that six citations were to be contested and attached copies of seven citations, and a subsequent email on the same day incorrectly confirmed a list of seven citations. Nevertheless, the communications consistently identified Citation No. 9781125 for contest. On June 26, outside counsel forwarded the June 20 communications to a paralegal and, based on those communications, instructed the paralegal to prepare a contest for seven citations. Accordingly, the paralegal checked the contest boxes for the *first seven citations* marked on the June 20 draft contest form and filed the notice of contest. He did not see that an eighth citation (No. 9781125) had been marked for contest because it was on a different page.

Carmeuse further states that the paralegal received the Penalty Petition for the seven timely contested citations on August 12, 2024, compared it against the earlier communications, and immediately notified outside counsel that Citation No. 9781125 had been omitted. Outside counsel confirmed with Carmeuse's Safety Manager that he had intended to contest the citation and moved to reopen on September 3, 2024. Carmeuse represents that, in the future, its outside counsel will review all contest forms completed by office staff before they are sent to MSHA.

The Secretary does not oppose Carmeuse's request to reopen. She notes that the operator timely filed its contest, made timely payment for the uncontested citations, moved to reopen within a reasonable period of time, and has taken measures to ensure the situation will not recur.

An operator's clear intent to contest a citation is relevant to whether good cause exists to reopen an assessment. *E.g., Dyno Nobel*, 46 FMSHRC 397, 398 (June 2024); *U.S. Silica Co.*, 39 FMSHRC 1787, 1788 (Sept. 2017). Here, Carmeuse consistently expressed an intent to contest Citation No. 9781125 when communicating with its counsel: the citation was checked on the draft contest form, attached to the first June 20 email, and listed in the follow-up June 20 email. Additionally, counsel timely contested the assessment. If not for the numerical inconsistencies in Carmeuse's emails (which understandably confused counsel and his office staff), Citation No. 9781125 would have been included in the operator's timely contest.

¹ Commission proceedings have since been initiated for the timely contested citations (Docket No. LAKE 2024-0226).

² The Secretary represents that Carmeuse paid the uncontested portion of the assessment on June 26, 2024, and that MSHA applied part of that payment to Citation No. 9781125 as an "administrative function." While the citation that Carmeuse now seeks to reopen has technically been paid, the Secretary represents that MSHA's administrative application of Carmeuse's lump sump payment does not appear to show the operator's intent to pay the penalty for this specific violation. Resp. at 2 n.2.

We also note that the counsel and his staff promptly identified the error and moved to correct it. The Penalty Petition for the timely contested citations was served on the operator on August 12, 2024. The paralegal reviewed it and noted the inconsistency that day, and counsel moved to reopen within the month. *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (motions received within 30 days of an operator’s first notice from MSHA that it has failed to timely contest have presumptively been filed within a reasonable amount of time).

Having reviewed Carmeuse’s request and the Secretary’s response, we find that the operator’s failure to timely contest the assessment was the result of excusable mistake.³ We also note that Carmeuse acted in good faith by promptly identifying the error and moving to reopen. 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



Timothy J. Baker, Commissioner

³ We note that the excusable mistake by outside counsel and his staff (omitting Citation No. 9781125 from the contest form) appears to have at least partly originated with typographical error(s) by the *operator’s* staff (misstating the number of citations). Carmeuse’s outside counsel has represented that he will conduct more stringent oversight to ensure the accuracy of future contest forms. Carmeuse should also take steps to ensure its staff gives proper attention to future communications regarding proposed assessments, as repeated typos may indicate general carelessness or an unreliable internal processing system and may result in denial of future motions. *See GCC Dacotah, Inc.*, 46 FMSHRC 628, 29 (Aug. 2024).

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, 977 (Dec. 2024) (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.

A handwritten signature in black ink, appearing to read 'Marvit', written in a cursive style.

Moshe Z. Marvit, Commissioner

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