

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

February 12, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2007-154-M
Petitioner	:	A.C. No. 22-00313-101052
v.	:	
	:	
HOLCIM (US) INCORPORATED,	:	Holcim Artesia Plant
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Feldman

This civil penalty matter concerns 104(d)(1) Citation No. 6243289 and 104(d)(1) Order No. 6243291 issued to Holcim (US) Incorporated (Holcim) on May 2, 2006. Holcim timely contested the citation and order in contest proceedings in Docket Nos. SE 2006-190-M and SE 2006 -191-M. The contest proceedings were stayed on June 12, 2006, pending the anticipated assignment of the related civil penalty case. On October 18, 2006, the Secretary proposed a total civil penalty of \$6,700.00 in satisfaction of the citation and order.

Pursuant to section 105(a) of the Federal Mine Safety and Health Act of 1977, an operator that wishes to contest a proposed civil penalty must notify the Secretary within 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).

Holcim failed to notify the Secretary within the required 30 day period. On February 8, 2007, Holcim filed a Motion to Reopen Penalty Proceeding with the Commission because it reportedly did not receive the Secretary’s October 18, 2006, proposed \$6,700.00 penalty assessment.¹ On March 23, 2007, the Commission remanded Holcim’s request to reopen to the Chief Administrative Law Judge (Chief ALJ) for a determination as to whether good cause existed for Holcim’s failure to timely notify the Secretary.

Finding excusable neglect, on September 4, 2008, the Chief ALJ granted Holcim’s

¹ Holcim alleges that it may not have been served with the Secretary’s proposed assessment because of a typographical error in the caption of the June 12, 2006, Stay Order in Docket Nos. SE 2006-190-M and SE 2006 -191-M. Although an error in the caption cannot affect MSHA’s mailing of a proposed assessment, it should be noted that a corrected stay order was issued eight days later on June 20, 2006, after Holcim reported the error in the original caption.

request to reopen, and ordered the Secretary to file a petition for the assessment of civil penalty. The Secretary filed the petition on October 21, 2008, once again seeking a total civil penalty of \$6,700.00. Holcim responded to the petition on October 27, 2008. This matter was assigned to me by the Chief ALJ on November 30, 2008.

The records of the Mine Safety and Health Administration's (MSHA's) Office of Assessments reflect that on October 23, 2008, Holcim paid a civil penalty of \$6,700.00 in satisfaction of 104(d)(1) Citation No. 6243289 and 104(d)(1) Order No. 6243291.² Consequently, on January 7, 2009, the contest proceeding in Docket Nos. SE 2006-190-M and SE 2006 -191-M were dismissed.³

Thus, MSHA records reflect that Holcim paid the civil penalty *after* its successful efforts to reopen this civil penalty matter. Holcim's excusable neglect has been compounded by its subsequent payment of the \$6,700.00 that has rendered consideration of its motion to reopen an unnecessary expenditure of scarce Commission resources.

ORDER

Accordingly, **IT IS ORDERED THAT**, the \$6,700.00 civil penalty having been paid, the civil penalty proceeding in Docket No. SE 2007-154-M **IS DISMISSED** with prejudice.

Jerold Feldman
Administrative Law Judge

Distribution:

² Holcim's payment documentation is of record. Holcim paid a civil penalty of \$6,700.00, in addition to interest of \$19.53. Holcim's total payment of \$6,719.53 was by Check No. 12750298 drawn on Wachovia Bank, dated October 15, 2008.

³ The contest proceedings in Docket Nos SE 2006-190-M and SE 2006 -191-M had not yet been consolidated with the civil penalty proceeding in Docket No. SE 2007-154-M.

Channah S. Broyde, Esq., Office of the Solicitor, U.S. Department of Labor,
61 Forsyth Street, SW, Room 7T10, Atlanta, GA 30303

Micheal T. Heenan, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C.,
2400 N Street NW, 5th Floor, Washington, DC 20037

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