

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
**1730 K STREET, N.W., Room 6003**  
**WASHINGTON, D. C. 20006-3867**  
Telephone No.: 202-653-5454  
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January 24, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-155-M
Petitioner	:	A. C. No. 04-00111-005527
	:	
	:	Docket No. WEST 2000-156-M
	:	A. C. No. 04-00111-05528
	:	
v.	:	Docket No. WEST 2000-157-M
	:	A.C. No. 04-00111-05529
	:	
	:	Docket No. WEST 2000-158-M
	:	A.C. No. 04-00111-05531
	:	
	:	Docket No. WEST 2000-159-M
	:	A.C. No. 04-00111-05532
	:	
	:	Docket No. WEST 2000-160-M
SAN BENITO AGGREGATES, INC.,	:	A.C. No. 04-00111-05533
Respondent	:	
	:	Mine: San Benito Aggregates

**ORDER DENYING REQUEST TO REOPEN**  
**ORDER OF DISMISSAL**

This case is before me pursuant to order of the Commission dated May 11, 2000.

On February 7, 2000, the operator filed a request to reopen the above-captioned penalty assessments which had become final orders of the Commission in accordance with section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

The Secretary opposed the request, stating that the operator had failed to establish that there was a potentially meritorious claim, which, she argued, is a prerequisite for relief under Fed. R. Civ. P. Rule 60(b), and that the operator did not establish conduct amounting to “excusable neglect” pursuant to Rule 60(b). Rule 60(b) states in pertinent part: “On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final

judgement, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect.”

A majority of the Commission remanded these matters for a determination of whether the operator has met the criteria in Rule 60(b).<sup>1</sup> The Commission stated that it appeared the operator had offered an explanation for its failure to timely file hearing requests but had not attached sufficiently reliable documents to substantiate its claim. The Commission also noted that the Secretary had alleged facts in addition to those raised by the operator.

On June 29, 2000, I issued an order directing the operator to submit information to my office, including reliable documentation, detailing why its failure to file on time meets the criteria outlined in Rule 60(b) and to show cause why these cases should be reopened.

The June 29 order was sent by certified mail return receipt requested to the operator, however, no return receipt was received by the Commission. On August 7, 2000, my law clerk contacted the operator by telephone inquiring whether the operator had received the order. My law clerk spoke with David Grimsley who stated that he did not have the order and that once he received the order he would call and advise how long it would take him to respond. The June 29 order was faxed to the operator on August 7.

Having not received a response after faxing the June 29 order to the operator, on November 30, 2000, an order to show cause was issued directing the operator to submit the requested information. On January 16, 2000, the operator filed a response. The operator states that it recognizes it has had problems in the past which led to the current citations and fines. The operator identifies the steps it has taken to try and correct these problems including hiring a retired MSHA inspector. Finally, the operator alleges that the penalties would place a heavy financial burden on its business.

The operator has failed to comply with the orders in these cases. The June 29 and November 30 orders direct the operator to submit information, including reliable documentation, detailing why its failure to file on time meets the criteria in Rule 60(b). The operator has offered no information regarding its failure to timely contest these matters. There are no statements of why the contests were late or reasons why based on Rule 60(b) the matters should be reopened, let alone any documentation supporting such explanations. Rather, the operator has merely set forth the steps it has taken to address the safety violations identified by MSHA and has expressed its view of its financial condition.

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<sup>1</sup> On May 15, 2000, the Secretary filed a petition for reconsideration, requesting the Commission to reconsider its order. On June 20, 2000, the Commission issued an order denying the Secretary’s request and upholding its previous order.

The operator has been given ample opportunity over the past six months to justify these cases being reopened. It has submitted nothing to justify a finding of mistake, inadvertence, surprise or excusable neglect. In light of the foregoing, the operator's request to reopen these case is **DENIED**.

It is **ORDERED** that these cases are **DISMISSED**.

David F. Barbour  
Chief Administrative Law Judge

Distribution: (Certified Mail)

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