

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 16, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2001-65-M
Petitioner	:	A. C. No. 19-01081-05502
v.	:	
	:	Mine: Read Customs Soils
READ SAND & GRAVEL,	:	
Respondent.	:	

ORDER DENYING MOTION TO REOPEN
ORDER TO PAY

Before: Judge Barbour

This case is before me pursuant to an order of the Commission dated October 23, 2001, remanding this matter for further consideration and determination as to whether the operator, Read Sand & Gravel (“Read”), is entitled to relief under Rule 60(b)(1) of the Federal Rules of Civil Procedure.¹ Rule 60(b)(1) provides relief from a final judgment in cases where there has been a “mistake, inadvertence, surprise, or excusable neglect.”

This matter arose because Read failed to notify the Secretary that it wished to contest the proposed penalty within 30 days of receipt of the proposed penalty assessment. In support of its request to reopen, Read makes four assertions: (1) it does not own, control or manage the subject property; (2) many of the violations exceed the scope of the Mine Act jurisdiction; (3) some of the cited areas are outside of the mine area; and (4) the Mine Safety & Health Administration (“MSHA”) did not contact the president and sole shareholder regarding visits, issues, or violations. Letter Dated Feb. 26, 2001.

The Secretary filed a response to the request, arguing that the first three grounds proffered by Read pertain to the substantive merits of the case rather than grounds for reopening the matter. Secretary’s Motion at 2. Further, the Secretary states that while the fourth ground may pertain to reopening, Read did not provide sufficient evidence to enable the Secretary to determine whether reopening is warranted. *Id.* In addition, the Secretary notes that MSHA did receive a certified mail receipt indicating that the assessment was received by Read. *Id.* at 2 n.2.

¹While the Commission is not obligated to adhere to the Federal Rules of Civil Procedure, the Commission has found guidance and has applied “so far as practicable” Rule 60(b). *See* 29 C.F.R. § 2700.1(b).

Subsequently, on December 28, 2001, I issued an order requiring Read to submit more information as to why it believes the case should be reopened within 30 days of the date of that order. In particular, I instructed Read to explain why it believes MSHA's failure to contact its president personally warrants reopening this matter. I did not receive Read's response within that time, and, therefore, I issued a second order on February 20, 2002, in which I gave Read 20 days to file the information. Finally, on March 7, 2002, I received a letter from Read dated March 4, 2002.

In the letter, Read president, Anthony P. Nickinello, asserts that on or about April 2000, MSHA made an unannounced visit at the work site of A.D. Makepeace ("A.D."), a cranberry grower for whom Read removed earthen materials from various locations. Nickinello states that he purchased Read on January 1, 2000, and continued the operation under the previous set of rules and guidelines of A.D. He further claims an MSHA inspector began to direct Read personnel towards presumed violations and continued to do so for several months without the knowledge of Nickinello or A.D. personnel. Nickinello contends he became aware of the circumstances while on a site visit when a second MSHA inspector arrived to investigate prior activity. The inspector, Nickinello further declares, informed him of the nature of the inspections, provided a correction list, and issued orders, with which Read complied. Neither A.D. management nor Read management, according to Nickinello, were informed by the "department"² that it would enforce mine safety regulations on an agricultural business. He finally asserts that A.D. and Read meet health and safety regulations, regardless of the agency responsible for ensuring compliance.

It appears that Read is questioning MSHA's jurisdiction because A.D. is an agricultural business and Read is its vendor. However, Read's response does not address the inquiry in my Orders as to why Read did not timely notify the Secretary it wished to contest the proposed penalty within 30 days of its assessment.

Accordingly, since Read has failed to address the issue, the request to reopen is **DENIED**. Read is **ORDERED** to pay the full proposed penalty assessment of \$944.00 within 30 days of the date of this order.³

David F. Barbour
Chief Administrative Law Judge

² I assume Nickinello means MSHA.

³ Payment may be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U. S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 360250M, PITTSBURGH, PA 15251

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