

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

DEC 23 2014

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

v.

BLUESTONE QUARRIES, INC.

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Docket No. SE 2011-577-M
A.C. No. 09-00996-255476

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, 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 September 4, 2013, the Commission received from Bluestone Quarries (“Bluestone”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On January 18, 2012, the Chief Administrative Law Judge issued an Order to Show Cause in response to Bluestone’s perceived failure to answer the Secretary of Labor’s June 23, 2011 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on February 21, 2012, when it appeared that the operator had not filed an answer within 30 days.

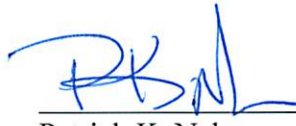
Bluestone asserts that it sent an answer to the Order to Show Cause on February 8, 2012 by certified mail. Bluestone provides a copy of the answer, along with an e-mail sent to the CLR assigned to the case at the time, confirming that the answer was mailed. Bluestone fails, however, to provide a certified mail receipt to prove delivery of the answer.

The Secretary of Labor opposes the request to reopen. The Secretary notes that the Commission has no record of ever receiving Bluestone’s answer to the Judge’s show cause order. The Secretary further asserts that the operator failed to follow up with the Judge to make sure that he received its reply. Finally, the Secretary emphasizes that Bluestone does not explain why it waited approximately one and a half years to submit its motion to reopen after the Default Order became effective, even though a delinquency letter was sent to Bluestone on June 14, 2012.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen assessments that have become final Commission orders. *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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 held that, in accordance with Rule 60(c) of the Federal Rules of Civil Procedure, a Rule 60(b) motion shall be made within a reasonable time, and in the case of mistake, inadvertence or excusable neglect, not more than one year after the order was entered or, in this case, became effective. *Newmont USA, Ltd.*, 31 FMSHRC 808, 809 (Jul. 2009); *JS Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004); *Lakeview Rock Products*, 19 FMSHRC 26, 28 (Jan. 1997).

As noted above, Bluestone failed to provide a certified mail receipt to prove delivery of the answer. Thus, we hereby remand the proceeding to the Chief Administrative Law Judge to determine if the operator in fact replied to the Order to Show Cause. If the operator demonstrates that it replied as asserted, we will conclude that the operator was not in default under the terms of the Order to Show Cause as it timely complied with the Order. *See Vulcan Construction Materials*, 33 FMSHRC 2164 (Sept. 2011). Thus, the Default Order would be rendered a nullity, and the Chief Administrative Law Judge should conduct further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. If, however, the operator fails to demonstrate that it replied to the Order to Show Cause, Bluestone's motion to reopen will be denied because it waited for over one year to submit its motion to reopen after the Default Order became effective.



Patrick K. Nakamura, Acting Chairman



Robert F. Cohen, Jr., Commissioner



William I. Althen, Commissioner

Distribution:

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Edwin J. Booth, Jr.
President
Bluestone Quarries, Inc.
2230 Athens Highway
P.O. Box 723
Elberton, GA 30635
ejbooth@elberton.net

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710