

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

FEB 11 2015

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

v.

BOB BAK CONSTRUCTION

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Docket No. CENT 2011-159-M
A.C. No. 39-01313-236458

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. (2006) (“Mine Act”). On August 5, 2013, the Commission received from Bob Bak Construction (“Bak”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On May 2, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms would become a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Bak’s failure to answer the Secretary’s December 20, 2010 Petition for Assessment of Civil Penalty.

Bak’s owner asserts that he did not answer the penalty petition because he misunderstood the procedures and thought he had fulfilled his responsibilities by timely contesting the proposed assessment. Bak further states that it had never received any other notification regarding this case. Bak’s recently-hired counsel discovered this delinquency while researching other matters. Bak recognizes that a significant amount of time had passed since it contested the proposed assessment, but maintains that in the interest of equity, this small operator should be permitted to defend the case on the merits, and present its inability to pay the \$86,400 assessed amount in addition to interest and penalty fees.

The Secretary of Labor opposes the request to reopen because it was filed two years after the Show Cause Order was issued. The Secretary states that MSHA mailed a delinquency notice on October 6, 2011, which was returned undelivered, and referred the case to the Department of Treasury for collection on January 2, 2012.

In reviewing Bak's request, we are given pause by an apparent inconsistency in the record before us. Our internal records seem to indicate that the Show Cause Order may not have been delivered to Bak, but was returned to the Commission as undelivered on May 12, 2011.¹ However, Bak's Motion to Reopen and supporting affidavit suggest that the Show Cause Order was received, but that Bak did not respond because it "did not understand the legal procedures and thought [it] did everything required when [it] contested the Proposed Assessment." Bak Aff. 2, ¶9; *see also* Bak Mot. to Reopen 2.

The issues raised by this inconsistency in the record require findings of fact that are the province of an administrative law judge in the first instance. *See, e.g., Pinnacle Mining Co.*, 29 FMSHRC 56, 57 (Jan. 2007). Thus, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Bak's failure to answer the Show Cause Order and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


In determining whether to reopen this case, the Chief Administrative Law Judge should consider if the operator actually received a copy of the Show Cause Order and whether the

¹ Internal Commission records include two receipts for certified mail which contain U.S. Postal Service tracking numbers. When the petition for reopening was received, Commission staff checked Postal Service records and discovered that one envelope was delivered to Denver, Colorado on May 6, 2011, and that the other envelope was returned to Washington, D.C. on May 12, 2011. Since Chief Judge Lesnick's Order to Show Cause was issued on May 2, 2011 and sent to the MSHA Solicitor's Office in Denver as well as to Bak, we surmise that the delivery on May 6 was the Show Cause Order to the Solicitor's Office. It appears that the envelope which was returned to Washington, D.C. on May 12 may have been an envelope containing the Show Cause Order which was intended for delivery to Bak, but returned undelivered.

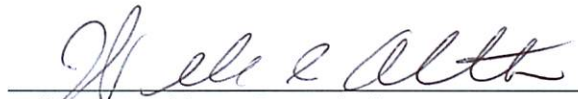
operator made a good faith attempt to receive mail at its address of record, particularly in light of the fact that mail appears to have been returned due to a lack of a mail receptacle.²



Patrick K. Nakamura, Acting Chairman



Robert F. Cohen, Jr., Commissioner



William I. Althen, Commissioner

² We note that it is the operator's responsibility to contact MSHA and the Commission to update its address of record. *Gudelsky Materials*, 35 FMSHRC 3258 (Oct. 2013).

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