

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

August 10, 2004

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

v.

SOUTHWEST CONCRETE &
PAVING, INC.

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Docket No. CENT 2004-192-M
A.C. No. 29-00473-08804

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, 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. (2000) (“Mine Act”). On July 12, 2004, the Commission received from Southwest Concrete & Paving, Inc. (“Southwest Concrete”) a motion made by counsel to reopen a penalty assessment that had become final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On September 18, 2003, MSHA issued a proposed penalty assessment to Southwest Concrete’s Mimbres Pit in Luna, New Mexico (Case Number 8804) for two citations (Citation Nos. 6222829 and 6222832, issued November 13, 2002). Southwest Concrete did not contest the proposed penalty. Southwest Concrete’s motion states that, as a result of “bookkeeping inadvertence,” the company paid the penalty for these citations even though it had been the company’s intention to contest them. Mot. at 1. In its motion, Southwest Concrete requests that the Commission reopen these penalties and consolidate this proceeding with Docket No. CENT 2004-49-M, which involves another citation issued to Southwest Concrete on November 13, 2002. *Id.* The Secretary states that she does not oppose Southwest Concrete’s request for relief.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *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 inadvertence or mistake. *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.

Having reviewed Southwest Concrete's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for the company's failure to timely contest the penalty proposals 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.

Michael F. Duffy, Chairman

Robert H. Beatty, Jr., Commissioner

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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