

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 10, 2004

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | |
| | : | Docket No. CENT 2004-49-M |
| v. | : | A.C. No. 29-00473-11213 |
| | : | |
| SOUTHWEST CONCRETE & | : | |
| PAVING, INC. | : | |

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 March 9, 2004, the Commission received from Southwest Concrete & Paving, Inc. (“Southwest Concrete”) a motion made by counsel to reopen a civil penalty proceeding dismissed by the Chief Administrative Law Judge because the contested penalty had been paid. The Commission construed Southwest Concrete’s motion to be a timely filed petition for discretionary review. On April 5, 2004, the Commission granted the petition and stayed briefing in the case pending further order of the Commission.

On October 17, 2003, MSHA issued a proposed penalty assessment to Southwest Concrete’s Mimbres Pit in Luna, New Mexico. Southwest Concrete timely submitted a request for hearing (“green card”) to contest the proposed penalty assessment for Citation No. 6222831. The Secretary of Labor filed a petition for assessment of penalty dated December 29, 2003.¹ Southwest Concrete’s motion states that, as a result of “bookkeeping inadvertence,” the company paid the contested penalty. Mot. at 1. Chief Administrative Law Judge Robert J. Lesnick dismissed Southwest Concrete’s contest on the grounds that the penalty had been paid. Order of

¹ Southwest Concrete answered the petition, but mistakenly used the wrong docket number on its answer. It does not appear, however, that this oversight had any effect upon the disposition of this case before the judge.

Dismissal (Feb. 26, 2004) (ALJ) (“On January 23, 2004, the Commission was informed . . . that the penalty in this case has been paid.”). In its motion, Southwest Concrete requests that the Commission vacate the judge’s dismissal order and reopen the proceeding. Mot. at 1. The Secretary does not oppose Southwest Concrete’s request to reopen the case.

Although Southwest Concrete paid the proposed penalty for Citation No. 6222831, it may have intended to continue its challenge of the penalty and underlying violation. However, the record does not contain sufficient information to permit us to determine whether the penalty payment was a “genuine mistake.” *See Dacotah Cement*, 23 FMSHRC 31, 32 (Jan. 2001).

Having reviewed Southwest Concrete's submissions, in the interests of justice, we remand this matter to the Chief Administrative Law Judge to determine whether Southwest Concrete's payment of the penalty constitutes a "genuine mistake" so as to support granting relief from the dismissal order for Citation No. 6222831. 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

Distribution

Jeffrey A. Dahl, Esq.
Lamb, Metzgar, Lines & Dahl, P.A.
300 Central Avenue, S.W., Suite 3000
P.O. Box 987
Albuquerque, NM 87103

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021