FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR WASHINGTON, D.C. 20006

May 11, 2001

SECRETARY OF LABOR,

MINE SAFETY AND HEALTH

ADMINISTRATION (MSHA)

on behalf of JOHN NOAKES

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v. : Docket No. CENT 2000-75-DM

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GABEL STONE COMPANY, INC.

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BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

On April 13, 2001, the Commission received a Motion for Reconsideration of Request for Review on Penalty Issued against Respondent from Gabel Stone Company ("Gabel Stone"). Under Commission Procedural Rule 78, 29 C.F.R. § 2700.78, a motion for reconsideration must be filed within 10 days after a decision or order by the Commission. The Commission issued its direction for review, expressly limiting review to the issues of John Noakes' mitigation of damages and the amount of the backpay award, on March 20, 2001. Gabel Stone's motion for reconsideration is thus untimely under the Commission's rules.

Gabel Stone, which is represented by counsel, has not presented a compelling explanation for the late-filing of its motion for reconsideration. Counsel for Gabel Stone claims that the reason for its motion for reconsideration is because he learned on April 9, 2001, of a February 2001 government agency report that encouraged agencies to give small businesses relief from harsh monetary penalties. Mot. at 2. However, the appropriateness of the penalty to "the size of the business of the operator charged" is one of the six criteria that must be considered in the assessment of the penalties pursuant to section 110(i) of the Federal Mine Safety and Health Act, 30 U.S.C. § 820(i), and the record demonstrates that the judge expressly relied on this factor in reducing the amount of the penalty assessed against Gabel Stone in this case. 23 FMSHRC 171, 179 (Feb. 2001) (ALJ).

| Mary Lu Jordan, Chairman |
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| James C. Riley, Commissioner |
| Theodore F. Verheggen, Commissioner |
| Robert H. Beatty, Jr., Commissioner |

Finally, Gabel Stone presents no evidence that its counsel misunderstood the Commission's

filing requirements.¹ Accordingly, the Motion for Reconsideration is denied.

¹ The Commission has previously reopened final Commission orders and excused the late-filing of petitions for discretionary review when parties' counsel misunderstood the Commission's filing requirements. *See Turner v. New World Mining, Inc.*, 14 FMSHRC 76, 77 (Jan. 1992) (finding sufficient allegation that counsel misinterpreted deadline for filing petition); *Boone v. Rebel Coal Co.*, 4 FMSHRC 1232, 1233 (July 1982).

Distribution

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