

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 3, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 99-310-M
	:	
STERLING SAND & GRAVEL COMPANY	:	

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

ORDER

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

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On September 20, 1999, the Secretary of Labor filed a petition for assessment of civil penalty against Sterling Sand & Gravel Co. (“Sterling”), a subsidiary of Mid-America Redi-Mix, Inc. (“Mid-America”), for six alleged violations of mandatory standards, and proposed a total assessment of \$726. Sterling had filed a request for a hearing but failed to answer the Secretary’s petition for assessment. On October 25, 1999, Chief Administrative Law Judge Paul Merlin issued an order to respondent to show cause, directing Sterling to file an answer within 30 days. On November 4, 1999, noting that the penalties had been paid, Chief Judge Merlin issued a decision approving the penalties and dismissing the case. The judge’s decision became final 40 days after its issuance, on December 14, 1999. 30 U.S.C. § 823(d)(1).

On May 9, 2000, the Commission received a letter from Marc Westhoff, owner of Mid-America, requesting that the judge’s decision approving the penalties and dismissing the case be set aside. Mot. Westhoff states that he purchased Mid-America and its holdings on September 28, 1999. *Id.* Westhoff claims that the check paying the subject penalties was written on August 25, 1999, prior to Westhoff’s ownership, but that the check did not clear until October 6, after Westhoff took ownership.¹ *Id.* He seeks reimbursement for this payment because he believes

¹ It appears that Westhoff is stating that although the previous owner of Sterling wrote the check, Westhoff effectively paid the penalties because funds for the check were drawn from Sterling’s account after Westhoff assumed ownership.

that he is not responsible for these penalties. *Id.* The Secretary of Labor does not oppose Sterling's request that these proceedings be reopened.

The judge's jurisdiction in this matter terminated when his decision was issued on November 4, 1999. 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); 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). The Commission received Sterling's request on May 9, nearly six months after the judge's decision became a final decision of the Commission.

A final Commission judgment or order may be reopened under Rule 60(b)(1) & (6) of the Federal Rules of Civil Procedure under circumstances such as mistake, inadvertence, excusable neglect, or other reasons justifying relief. *See* 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). The Commission has granted requests to reopen where operators have mistakenly paid penalties and shown that they intended to contest the penalties. *Doe Run Co.*, 21 FMSHRC 1183, 1184-85 (Nov. 1999); *Cyprus Emerald Resources Corp.*, 21 FMSHRC 592, 592-93 (June 1999).

Here, however, Sterling has not alleged that it had intended to contest the penalty that was paid. Instead, Westhoff merely argues that he is not responsible for the payment of the penalty because the subject "citation was written against the old owner, but was paid by me, the new owner." Mot. But Westhoff fails to explain how his purchase of Sterling affected the *company's* responsibility to pay the penalty. We thus conclude that Sterling has failed to set forth grounds justifying relief under Rule 60(b).²

² Whether Westhoff is entitled to reimbursement from the previous owner of Sterling for an unanticipated expense arising under the terms of the sale of the business is an issue of contract or corporate law, not a matter arising under the Mine Act which the Commission may review.

Accordingly, Sterling's request for relief is denied.³

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

³ In view of the fact that the Secretary does not oppose Sterling's motion to reopen this matter for a hearing on the merits, Commissioner Marks concludes that the motion should be granted.

Distribution

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