

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 19, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2003-276-M
ADMINISTRATION (MSHA)	:	A.C. No. 48-00243-05554
	:	
	:	Docket No. WEST 2003-277-M
v.	:	A.C. No. 48-00617-05545
	:	
	:	Docket No. WEST 2003-278-M
BLACK HILLS BENTONITE, LLC	:	A.C. No. 48-01539-05506

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. (1994) (“Mine Act”). On May 9, 2003, the Commission received from Black Hills Bentonite, LLC (“Black Hills”) a motion made by counsel to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

On April 3, 2003, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued three proposed penalty assessments (A.C. Nos. 48-00243-05554, 48-00617-05545, and 48-01539-05506) to Black Hills. In its motion, Black Hills states that on January 31, 2003, it contested three underlying citations, which are the subject of Docket Nos. WEST 2003-149-RM through 2003-151-RM, and are stayed before Judge Bulluck. Mot. at 1-2. Black Hills also states that MSHA subsequently modified the citations to non-S&S, low negligence and gravity, and on April 3, 2003, issued proposed penalty assessments for the three contested

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2003-276-M, WEST 2003-277-M, and WEST 2003-278-M, all captioned *Black Hills Bentonite, LLC*, and involving issues similar to those addressed in this order. 29 C.F.R. § 2700.12.

citations in the amount of \$55 each, along with proposed assessments for five other citations, which are not the subject of Black Hills' initial contest or its request to reopen. *Id.* at 2. Black Hills further states that it failed to timely contest the proposed assessments related to the contested citations, because it inadvertently paid the assessments for both the contested and uncontested citations. *Id.* Black Hills attached an affidavit supporting its motion. *See id.*, Ex. A. The Secretary states that she does not oppose Black Hills' 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 Black Hills' 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 Black Hills' failure to timely contest the penalty proposal 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

Distribution

Karen L. Johnston, Esq.
Jackson & Kelly, PLLC
1099 18th Street, Suite 2150
Denver, CO 80202

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