

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

May 21, 2004

SECRETARY OF LABOR,	:	Docket No. WEST 2004-149-M
MINE SAFETY AND HEALTH	:	A.C. No. 10-01827-05516
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2004-150-M
	:	A.C. No. 10-01827-05518
	:	
	:	Docket No. WEST 2004-151-M
	:	A.C. No. 10-01827-05519
	:	
v.	:	Docket No. WEST 2004-152-M
	:	A.C. No. 10-01907-14547
	:	
	:	Docket No. WEST 2004-153-M
	:	A.C. No. 10-01907-00002819
	:	
	:	Docket No. WEST 2004-154-M
	:	A.C. No. 10-01907-12100
	:	
BECO CONSTRUCTION COMPANY	:	Docket No. WEST 2004-155-M
	:	A.C. No. 10-02031-05501

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 January 22, 2004, the Commission received from Beco Construction Company (“Beco”) a request made by counsel to reopen 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). On February 3, 2004, the Secretary of Labor filed a Response to Request to Reopen Penalty Assessments. On February 23, 2004, Beco filed a reply to the Secretary’s response.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its request, Beco seeks to reopen ten proposed penalty assessments for which it failed to timely file requests for hearing (“green cards”). Mot. at 1-3. Two proposed assessments, in Docket Nos. WEST 2003-104-M and WEST 2003-105-M, are the subject of an earlier request to reopen filed by Beco, which the Commission has considered and remanded to the Chief Administrative Law Judge for further proceedings. *See Beco Constr. Co.*, 26 FMSHRC 171 (Mar. 2004). Another assessment, in Docket No. WEST 2004-106-M, is still pending before a Commission Administrative Law Judge and thus is not ripe for review. Beco has moved to withdraw its request to reopen a fourth assessment, Docket No. WEST 2004-153-M, on the basis that it paid the underlying proposed assessment. B. Reply at 2. Thus, pending before the Commission in this request to reopen are a motion to withdraw and a request to reopen six proposed assessments that became final orders of the Commission pursuant to section 105(a) thirty days after Beco received them.¹

A. Motion to Withdraw Docket No. WEST 2004-153-M

In Beco’s reply to the Secretary’s response, Beco states: “The Respondent hereby withdraws its request to open this assessment [A.C. No. 10-01907-00002819]² inasmuch as it has been paid.” B. Reply at 2. Commission Procedural Rule 11 states, “[a] party may withdraw a pleading at any stage of a proceeding with the approval of the . . . Commission.” 29 C.F.R. § 2700.11. Under Rule 11, we construe Beco’s withdrawal of its request as a motion to withdraw. The Secretary has not stated a position on Beco’s motion to withdraw.

Upon consideration of Beco’s motion to withdraw, it is granted.

B. Docket Nos. WEST 2004-150-M, WEST 2004-151-M, WEST 2004-152-M, and WEST 2004-154-M

Beco requests the Commission to reopen two proposed assessments, A.C. Nos. 10-01827-05518 (WEST 2004-150-M) and 10-01907-14547 (WEST 2004-152-M) (Mot. at 2), neither of

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate the dockets before us, WEST 2004-149-M, WEST 2004-150-M, WEST 2004-151-M, WEST 2004-152-M, WEST 2004-153-M, WEST 2004-154-M, and WEST 2004-155-M, all captioned *Beco Construction Company* and all involving issues similar to those addressed in this order. 29 C.F.R. § 2700.12.

² “A.C. No.” is the Assessment Control Number, which MSHA assigns to a proposed penalty assessment.

which the Secretary opposes (S. Response at 4). With respect to A.C. No. 10-01827-05518, Beco alleges that it contested the proposed assessment, but misread the A.C. number and put the wrong number on its contest. Mot. at 2. When the Department of Labor's Mine Safety and Health Administration ("MSHA") notified Beco of the delinquent payment status of this assessment, Beco requested to proceed with its contest, but states that it now understands that it should have filed a request to reopen. *Id.* With respect to A.C. No. 10-01907-14547, Beco alleges that it filed a timely contest on December 19, 2003. Mot. at 2. Attached to Beco's request are copies of correspondence with MSHA and the proposed penalty assessments referenced in its request. Attachs.

Beco also states that it never received the proposed assessments for A.C. Nos. 10-01827-05519 (WEST 2004-151-M) and 10-01907-12100 (WEST 2004-154-M), and thus, failed to timely file hearing requests. Mot. at 2-3. The Secretary asserts, however, that she has proof that the proposed assessments were delivered and that Beco received them. S. Response at 3. She states that she needs further explanation from Beco before she can state her position on its request to reopen these proposed assessments. *Id.* Attached to her response are both proposed assessments and signed return receipt verification cards for each assessment. Attachs. D and E.

Beco's counsel replies that Beco never gave its counsel the two proposed assessments at issue, that he is located across the state approximately 300 miles away from Beco, and that he has tried to establish a system for forwarding proposed assessments for review and discussion, which sometimes fails. B. Reply at 3-4. Beco further states that because counsel never received the assessments, no decision was ever made whether to contest them. *Id.* Beco requests a hearing on the proposed assessments. *Id.*

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. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond to a penalty petition, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Beco's request, in the interests of justice, we remand these four proposed assessments to the Chief Administrative Law Judge for a determination of whether good cause exists for Beco's failure to timely contest the penalty proposals and whether relief from the final orders 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.

C. Docket Nos. WEST 2004-149-M and WEST 2004-155-M

MSHA issued proposed assessment A.C. No. 10-01827-05516 (WEST 2004-149-M) to Beco on June 21, 2001. S. Response at 2-3 & n.4. Based on the Secretary's submissions, Beco received the proposed assessment on June 26, 2001, and it became a final order on July 30, 2001. *Id.* Beco's request to reopen was filed on January 22, 2004. Beco explains that it failed to provide its counsel this proposed assessment. Mot. at 2; B. Reply at 2. Beco also states that its counsel is located across the state, and that they have tried to establish a system for forwarding proposed assessments for review and discussion, which sometimes fails. B. Reply at 2-3. Beco explains that because counsel never received this assessment, no decision was ever made whether to contest it. *Id.* at 3. Beco requests a hearing. *Id.*

MSHA issued proposed assessment A.C. No. 10-02031-05501 (WEST 2004-155-M) to Beco on September 5, 2002. S. Response at 1-2 & n.2. Based on the Secretary's submissions, Beco received the proposed assessment in September 2002, and it became a final order on October 20, 2002. *Id.* Beco alleges that it sent a notice of contest for this proposed assessment at the same time it contested two other unrelated proposed assessments. Mot. at 1; B. Reply at 2. Attached to its request is a copy of the late-filed notice of contest dated November 11, 2002. Attach. Beco states that it did not know that its contest was untimely because counsel did not receive the proposed assessment until November 20, 2002. Mot. at 1-2; B. Reply at 2. Beco asserts that if it had known its contest was untimely, it would have requested the Commission to reopen this assessment as it did with the other two unrelated proposed assessments (*see Beco*, 26 FMSHRC at 171-72). Mot. at 1; B. Reply at 2.

The Secretary opposes reopening both proposed assessments because Beco's requests were filed approximately two and one-half years and 15 months, respectively, after the assessments became final. S. Response at 1-3. The Secretary attached to her response both proposed assessments, signed return receipt verification cards for each assessment, and MSHA's delinquent payment notice for A.C. No. 10-02031-05501 dated November 20, 2002. Attach.

Beco has requested to reopen these two proposed assessments more than one year after the assessments became final orders. In *Lakeview Rock Products*, the Commission rejected an operator's request to reopen a proposed penalty assessment that became a final order more than one year prior to its request. 19 FMSHRC 26, 28-29 (Jan. 1997). The Commission noted that a "Rule 60(b) motion 'shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.' . . . This one-year time limit is an outside time limit for motions requesting relief under subsections (1) through (3), and may not be circumvented by utilization of subsections (4) through (6) of Rule 60(b), which are subject only to a reasonable time limit, when the real reason for relief falls

within subsections (1) through (3).”³ *Id.* at 28 (citation omitted). *See also Klapport v. United States*, 335 U.S. 601, 613 (1949) (“one year limitation would control if no more than ‘neglect’ was disclosed by the petition”); *Newball v. Offshore Logistics Int’l*, 803 F.2d 821, 827 (5th Cir. 1986) (“where the reason for relief is embraced in Clause (b)(1), the one year limitation cannot be circumvented by use of Clause ... (b)(6)”) (citation omitted).

Beco’s requests to reopen the proposed assessments under Rule 60(b)(1) are subject to the one-year time bar and are, therefore, untimely. *See Lakeview*, 19 FMSHRC at 28-29. Based on the foregoing, we deny Beco’s motion for relief from the final orders in Docket Nos. WEST 2004-149-M and WEST 2004-155-M.

³ Rule 60(b) states, in part:

[T]he court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b).

Accordingly, we grant Beco's motion to withdraw its request for relief in Docket No. WEST 2004-153-M and hereby dismiss that docket; we deny Beco's request to reopen the penalty assessments in Docket Nos. WEST 2004-149-M and WEST 2004-155-M; and we remand Docket Nos. WEST 2004-150-M, WEST 2004-151-M, WEST 2004-152-M, and WEST 2004-154-M for further proceedings as appropriate.

Michael F. Duffy, Chairman

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