

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

October 7, 2004

SECRETARY OF LABOR,	:	Docket No. YORK 2004-50-M
MINE SAFETY AND HEALTH	:	A.C. No. 30-03325-05501
ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2004-51-M
	:	A.C. No. 30-03325-05502
	:	
v.	:	Docket No. YORK 2004-52-M
	:	A.C. No. 30-03325-05503
	:	
J S SAND & GRAVEL, INC.	:	Docket No. YORK 2004-53-M
	:	A.C. No. 30-03325-08141

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

ORDER

BY: Duffy, Chairman; Suboleski, and Young, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”).<sup>1</sup> On June 29, 2004, the Commission received from J S Sand & Gravel, Inc. (“JSSG”) a letter from its president which included a request that the Commission reopen four 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 July 8, 2004, the Secretary of Labor filed a Response to Request to Reopen Penalty Assessments.

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

---

<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers YORK 2004-50-M, YORK 2004-51-M, YORK 2004-52-M, and YORK 2004-53-M, all captioned *J S Sand & Gravel, Inc.*, and all involving similar procedural issues. 29 C.F.R. § 2700.12.

a final order of the Commission. 30 U.S.C. § 815(a). In its petition, JSSG gives no reason for its failure to contest any of the four penalty assessments.

A. Docket Nos. YORK 2004-50-M, YORK 2004-51-M, and YORK 2004-52-M

Based on the Secretary's submission, MSHA issued proposed assessment A.C. No. 30-03325-05501 (YORK 2004-50-M) to JSSG on May 11, 2001, JSSG received the proposed assessment on May 17, 2001, and it became a final order on June 22, 2001. S. Resp. at 1 & Attach. A. Similarly, MSHA issued proposed assessment A.C. No. 30-03325-05502 (YORK 2004-51-M) to JSSG on August 30, 2002, JSSG received it on September 6, 2002, and it became a final order on October 11, 2002. *Id.* at 2 & Attach. B. In addition, MSHA issued proposed assessment A.C. No. 30-03325-05503 (YORK 2004-52-M) to JSSG on January 16, 2003, JSSG received it on January 24, 2003, and it became a final order on February 27, 2003. *Id.* at 2 & Attach. C. JSSG provides no reason in its request to reopen why it did not timely contest any of the three assessments.

The Secretary opposes reopening all three proposed assessments because JSSG's requests were filed approximately three years, 20 months, and 16 months, respectively, after the assessments became final. S. Resp. at 1-2. The Secretary attached to her response copies of the proposed assessments, signed return receipt verification cards indicating JSSG had received the proposed assessments, and MSHA's delinquent payment notice for each assessment. *Id.*, Attach. A to C. JSSG did not reply to the Secretary's response.

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. *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. For instance, relief from a final Commission judgment or order is available to a party under Rule 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. We have 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).

However, under Rule 60(b) any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered. Fed. R. Civ. P. 60(b). Here, JSSG has requested reopening of the three proposed assessments more than one year after each assessment became a final Commission order, and has provided no explanation of why it never responded to the correspondence it received from MSHA. Consequently, we deny JSSG's motion for relief from the final orders in Docket Nos. YORK 2004-50-M, YORK 2004-51-M, and YORK 2004-52-M.

B. Docket No. YORK 2004-53-M

JSSG also requests the Commission to reopen another proposed assessment, A.C. No. 30-03325-08141 (YORK 2004-53-M). According to JSSG, that assessment issued on September 11, 2003. The Secretary responds that because JSSG identifies no grounds for requesting reopening of the assessment, the Commission should direct JSSG to provide a detailed explanation of why it believes circumstances warrant reopening. S. Resp. at 3.

JSSG has provided no explanation for its failure to timely contest the proposed assessment. On the basis of the present record, we are thus unable to evaluate the merits of JSSG's request to reopen. We hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for JSSG's 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.

Accordingly, we deny JSSG's request to reopen the penalty assessments in Docket Nos. YORK 2004-50-M, YORK 2004-51-M, and YORK 2004-52-M and the proceedings are hereby dismissed, and we remand Docket No. YORK 2004-53-M for further proceedings as appropriate.

---

Michael F. Duffy, Chairman

---

Stanley C. Suboleski, Commissioner

---

Michael G. Young, Commissioner

Commissioner Jordan, concurring in part and dissenting in part:

I agree with the majority's decision to deny JSSG's request to reopen the penalty assessments in Docket Nos. YORK 2004-50-M, YORK 2004-51-M, and YORK 2004-52-M. However, I would also deny the operator's request for relief from the final order in YORK 2004-53-M. Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, we have previously afforded a party relief from a final order on the basis of inadvertence or mistake. Slip op. at 2. However, JSSG has failed to provide any explanation to justify its failure to timely contest the proposed penalty assessment. *See Tanglewood Energy, Inc.*, 17 FMSHRC 1105, 1107 (July 1995) (denying request to reopen final Commission order where operator failed to set forth grounds justifying relief). I also note that this matter involves four proposed penalty assessments issued between May 22, 2001 and September 11, 2003 which the operator failed to timely contest. Consequently, I respectfully dissent.

---

Mary Lu Jordan, Commissioner

Distribution

Jeff DeFranco, President  
J S Sand & Gravel, Inc.  
139 C Peconic Avenue  
Medford, NY 11763

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
1100 Wilson Blvd., 22<sup>nd</sup> 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