FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
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September 29, 2010

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2007-273-M
Petitioner	:	A.C. No. 03-01875-62140
	:	
v.	:	
	:	
	:	
PARKSTONE,	:	
Respondent	:	Mine: Park Stone

ORDER DENYING RESPONDENT'S REQUEST TO REOPEN PENALTY ASSESSMENT ORDER TO PAY

This case is before me pursuant to an order of the Commission dated, September 7, 2007, remanding these matters for further consideration and determination as to whether the operator, Parkstone, is entitled to relief under Rule 60(b) of the Federal Rules of Civil Procedure.[1] In particular, Rule 60(b)(1) provides relief from a final judgment in cases where there has been a "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1).

This matter arose because Parkstone failed to notify the Secretary of Labor ("Secretary") that it wished to contest the proposed penalties within 30 days of receipt of the proposed penalty assessments. Parkstone alleges that it failed to respond to the penalty assessment because it mistakenly believed the citations were dismissed as part of other litigation. However, Parkstone's request to reopen was filed almost two years after the assessment became a final Commission order, and thus, would be untimely.[2] Nevertheless, Parkstone's additional claim of MSHA's lack of jurisdiction is not time-barred. *Sea-Land Serv., Inc. v . Ceramica Europa II,*

[1] While the Commission is not obligated to adhere to the Federal Rules of Civil Procedure, the Commission has found guidance and has applied "so far as practicable" Rule 60(b). 29 C.F.R. § 2700.1(b).

[2] Under Fed. R. Civ. P. 60(b)(1), 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.

Inc., 160 F.3d 849, 852 (1st Cir. 1998); *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994). Parkstone asserts that the activities involved are not subject to Mine Act jurisdiction and the citations should be vacated. The Secretary opposes reopening the proposed penalty assessment and states that Parkstone's jurisdictional claim is not meritorious.

In prior litigation, specifically, Docket No. CENT 2005-96-M, in which the citations in that case were dismissed, Parkstone agreed and stipulated that MSHA has jurisdiction in the "pit" area of Parkstone's operation.[3] (*See* Stipulations and Motion to Approve Settlement Agreement, signed and dated August 16, 2006). Parkstone further agreed that the products of its mine, 03-01875, enter commerce or affect commerce within the meaning of sections 3(d), 3(h), and 4 of the Mine Act. *Id*.

Section 3(h)(1) of the Mine Act defines "coal or other mine" as "an area of land from which minerals are extracted . . . and lands . . . structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, or resulting from, the work of extracting such minerals . . . or used in, or to be used in, the milling of such minerals." 30 U.S.C. § 802. Section 4 of the Mine Act states that each mine, "the products of which enter commerce, or the operations of products of which affect commerce . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803.

First, Parkstone's jurisdictional claim is based on the assertion that the "mine site [sic] is located on private property and operated by family members owning the property with no employees." (Motion at 1). Parkstone states that the Secretary sent Commission Judge Jacqueline Bulluck a document stating that "[t]he following factors, among others, shall be considered in making determinations of what constitutes mineral *mining* under 3(h)(1) and whether a physical establishment is subject to either authority by MSHA or OSHA: . . . the number of individuals employed in each process." (emphasis added) (Motion at 2). However, that document, a prehearing report, actually stated, in relevant part, "what constitutes mineral *milling* under 3(h)(1). . . ." (emphasis added).

The twelve citations in the case at hand all involve the mining areas, the "pit" or equipment used in the pit and mining operations, or record-keeping and reporting. None of the citations mention the "garden" area that Parkstone asserts is not subject to MSHA jurisdiction. The pit area is undisputedly a mineral extraction area, and the products of the pit area enter commerce and affect commerce within the meaning of the Mine Act. Additionally, the pit water pump is equipment used in the work of extracting minerals. Therefore, the number of individuals employed is not a jurisdictional consideration and MSHA properly issued the citations and Parkstone is subject to the Mine Act jurisdiction. Accordingly, Parkstone's request to reopen based on mistake is time-barred as discussed above.

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[3] Parkstone states that when the citations were dismissed in Docket No. CENT 2005-96-M, it mistakenly believed the citations in the case at hand (Docket No. CENT 2007-273-M) were also dismissed.

Even if the request to reopen was not time-barred, Parkstone has not made a showing of extraordinary circumstances. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988); *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). Parkstone's conclusory statement that it believed the underlying citations in this case were part of another case lacks sufficient detail. The statement does not demonstrate extraordinary circumstances, and does not provide an adequate basis to reopen.

Also, Parkstone has not identified any facts that, if proven on reopening, would constitute a meritorious defense. *See FG Hemispheres Associates, LLC v. Democratic Republic Of Congo*, 447 F.3d 835 (D.C. Cir. 2006). The only defense suggested by Parkstone is lack of jurisdiction, which, as discussed above, is not meritorious

Based on the foregoing, Parkstone's request to reopen the penalty assessment is **DENIED**. Parkstone is **ORDERED TO PAY** the proposed penalty assessment of $1,081.00 within 30 days of this order.[4] Upon receipt of payment, this matter is **DISMISSED**.

Robert J. Lesnick
Chief Administrative Law Judge

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[4]Payment should be sent to: U.S. Department of Labor, Payment Office/MSHA, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.