FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D. C. 20006-3868

July 30, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 97-140
Petitioner	:	A. C. No. 01-01322-04075
	:	
v.	:	No. 5 Mine
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	

ORDER DENYING MOTION TO REOPEN

This case is before me pursuant to the Commission=s order of remand dated June 2, 1997.

The Secretary issued a notice of proposed penalty assessment against the operator and the operator filed a request for hearing. However, the request was filed 5 days late. The operator seeks to have the matter reopened and the Solicitor opposes.

The operator=s brief represents that the delay was caused by following reasons: a recent influx of citations and orders, an unusually heavy caseload, current corporate downsizing with elimination of many positions, many other responsibilities for its attorney, and misplacing the file in this case and not putting the case on the attorney=s calendar. The operator seeks relief under Rule 60 (b)(1) and (6).

In her brief the Solicitor argues that the reasons advanced by the operator are insufficient to justify granting relief. She states that the operator is a large corporation which routinely deals with citations issued by the Mine Safety and Health Administration (hereafter referred to as AMSHA@). Accompanying the brief is an affidavit of the Chief of MSHA=s Civil Penalty Compliance Office stating that since January 1996, the operator has filed five other untimely requests for hearing, that it did not seek reopening in three of them and that in two of them reopening was granted.

Section 105(a) of the Act, 30 U.S.C. ' 815(a), provides that an operator has 30 days within which to notify the Secretary that it wishes to contest the citation or proposed assessment. If within 30 days of receipt of the Secretary=s notification, the operator fails to notify the

Secretary that it intends to contest the citation or proposed assessment, the proposed assessment becomes a final order of the Commission. Id. The Commission has held that it has jurisdiction to decide whether final judgments can be reopened. Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993).

Commission Rule 1(b) provides that the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure. 29 C.F.R. ' 2700.1(b). In its June 2 order in this case, the Commission stated that it possesses jurisdiction to reopen uncontested assessments which have become final under section 105(a), supra, and that these determinations are made with reference to Federal Rule 60(b). Federal Rule 60(b)(1) provides as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party=s legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect * * *. The 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.

Federal Rule 60 (b) (6) which allows the filing of a motion at any time provides as follows:

> [A]ny other reason justifying relief from the operation of the judgment.

The motion to reopen in the instant matter was filed within one year.

In Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U. S. 380 (1993), the Supreme Court recognized that Bankruptcy Rule 9006(b)(1), which contains the same Aexcusable neglect@ standard as Rule 60(b)(1), grants a reprieve for out-of-time filings delayed by Aneglect@. 507 U. S. at 388. In interpreting this provision, the Court first turned to the ordinary meaning of Aneglect@, which it said was to give little attention or respect to a matter or to leave undone or unattended to, especially through carelessness. Id. The Court said that the word Aneglect@ therefore, encompassed both simple, faultless omissions to act and, more commonly, omissions caused by carelessness. Id. The Court further held that absent sufficient indication to the contrary courts assume that Congress intends words in its enactments to carry their ordinary contemporary common meaning. Id. Consequently, based on the plain meaning of neglect, the Court rejected an inflexible approach that would exclude every instance of inadvertent or negligent omission. Id. at 394-395.

With respect to the meaning of excusable neglect the Court in Pioneer stated as follows:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered Aexcusable,@ we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party=s omission. These include,. . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. at 395.

Many Courts of Appeals have acknowledged and followed the test set forth in Pioneer. U. S. v. Hooper, 9 F.3d 257 (2nd Cir. 1993); Matter of Christopher, 35 F.3d 232 (5th Cir. 1994); U. S. v. Clark, 51 F.3d 42 (5th Cir. 1995); Reynold v. Wagner, 55 F.3d 1426 (9th Cir. 1995); City of Chanute, Kansas v. Williams Nat. Gas Co., 31 F.3d 1041 (10th Cir. 1994); Information Systems and Networks Corp. v. U.S., 994 F.2d 792 (Fed. Cir. 1993). See also, In Re SPR Corp., 45 F.3d 70 (4th Cir. 1995). Although Pioneer was a case that arose under the bankruptcy rules, it has been applied beyond the context of bankruptcy to other situations where pertinent rules contain the same standard of Aexcusable neglect@. U. S. v. Hooper, supra at 259; U. S. v. Clark, supra at 44; Reynold v. Wagner, supra at 1429; Information Systems and Networks Corp. v. U. S., supra at 796. In this context it has been recognized that the client is bound by the acts and omissions of its counsel. Pioneer 507 U. S. at 396-397; Nichols v. G.D. Searle & Co., 991 F.2d 1195, 1202 (4th Cir. 1993).

Applying the criteria of Pioneer, I conclude that relief cannot be granted in this case. The operator alleges that it is laboring under an unusually heavy caseload. However, it has furnished no data to support this contention and no information to show that the number of cases it now has exceeds prior levels of activity. Such a showing is essential in light of the fact that the total number of actions pending before Commission Judges has been declining. In addition, the operator=s excuses of corporate downsizing and multiple responsibilities for its counsel cannot serve as a basis for relief. It appears that the operator has consciously decided to allocate fewer resources to mine safety litigation. Whatever the merits of that decision may be in other contexts, in the instant matter the operator must live with the consequences of its intentional actions. After considering all the circumstances, I determine that on balance the equities do not favor the operator. In Pioneer, petitioner=s counsel was late in part because he was experiencing upheaval in his practice due to his withdrawal from his law firm. However, the Court said that it gave little

weight to that circumstance and stated that the client must be held accountable for the acts and omissions of its attorney. Pioneer, 507 U. S. at 396-397. Following Pioneer, it has been held that oversight due to corporate restructuring did not constitute excusable neglect. United States v. RG & B Contractors, 21 F.3d 952 (9 Cir. 1994). If corporate downsizing were accepted as grounds for relief here, it would have to be accepted in all cases involving this operator for the foreseeable future.

This conclusion is also consistent with Commission precedent. The Commission has held that the mere fact an operator is involved in bankruptcy and cost cutting does not provide a basis for relief. Green Coal Company, Inc., 18 FMSHRC 1594 (September 1996). The Commission also rejected confusion over cases and the absence of the owner as reasons for reopening. The Pit, 16 FMSHRC 2033 (October 1994). And like the Courts, the Commission has held that the client is bound by the actions of its attorney. Cannelton Industries, Inc., 18 FMSHRC 1597 (September 1996).

The Commission has allowed reopening, but the overriding consideration in almost all those cases was the absence of counsel for the operator. A. H. Smith Stone Company, 11 FMSHRC 796, 798 (May 1989); C&B Mining Company, 15 FMSHRC 2096, 2097 (Oct. 1993). In its remands the Commission has considered the absence of counsel in the forefront of relevant reasons that could justify reopening. Kelley Trucking Company, 8 FMSHRC 1867, 1868 (Dec. 1986). See also, CG&G Trucking, Inc., 15 FMSHRC 193 (Feb. 1993); Mustang Fuels Corporation, 13 FMSHRC 1061, 1062 (July 1991); James D. McMillen, Employed by Shillelagh Mining Company, 13 FMSHRC 778, 779 (May 1991). I previously allowed reopening under the principles of Pioneer in a case involving a small pro se operator. R B Coal Company, 17 FMSHRC 2153 (November 1995).

In its motion the operator seeks relief under Rule 60(b) (1) and (6). This request is unfounded. It is well established that these subparagraphs are mutually exclusive. Pioneer, 507 U. S. at 393; Information Systems and Network Corporation, supra at 796. The Commission has likewise recognized that relief is not available under both sections simultaneously. Lakeview Rock Products, Inc., 19 FMSHRC 26 (January 1997).

So too, the Solicitor does not appear conversant with applicable law. She cites a 1950 decision by the Supreme Court which dealt with Rule 60(b) (6). Ackermann v. United States, 340 U.S. 193. Nowhere does she cite Pioneer or any of the cases that follow it. Nor does she evidence any awareness of the differences between subparagraphs (1) and (6). The Solicitor=s reference to the fact that since January 1996 the operator has been late five times in seeking reopening is not helpful. In two cases, MSHA reopened and the operator dropped the remaining three. No information was given regarding the circumstances of these cases.

In light of the foregoing, it is **ORDERED** that the motion to reopen be **DENIED**.

Paul Merlin
Chief Administrative Law Judge

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