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PITTSBURG & MIDWAY V. SOL (MSHA)
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June 24, 1993

PITTSBURG & MIDWAY COAL	:	
MINING COMPANY	:	
	:	
v.	:	Docket No. SPECIAL 92-02
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"), Pittsburg & Midway Coal Mining Company ("P&M") filed with the Commission a Notice of Contest and Motion for Partial Relief from Final Order, seeking to reopen certain uncontested civil penalty assessments in which P&M had paid in full penalties proposed by the Secretary of Labor. As the basis for its motion, P&M cites Rule 60(b), Federal Rules of Civil Procedure ("Rule 60(b)"), and principles of equity.

P&M contends that the penalties in dispute were invalidly augmented on the basis of the interim "excessive history" program set forth in the Secretary's Program Policy Letter No. P90-III-4 (May 29, 1990)(the "PPL"), which the Commission concluded in Drummond Co., 14 FMSHRC 661, 692 (May 1992), and related cases, could be accorded no legal weight or effect. P&M seeks refunds of those portions of paid penalties attributable to augmentations under the PPL.

This case is one of 19 special proceedings in which notices of contest and motions for relief from final orders were filed by mine operators. All of these cases raise identical issues. For the reasons fully set forth in Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993) ("JWR"), we hold that the Commission possesses jurisdiction to reopen final orders, including orders in which uncontested penalties were paid, but conclude that P&M's request does not meet the requisite criteria under Rule 60(b) or principles of equity for the grant of such relief. Accordingly, we deny P&M's motion to reopen and we dismiss this proceeding.

In JWR, we held that a final order of the Commission may be reopened by the Commission in appropriate circumstances pursuant to Rule 60(b). 15 FMSHRC at 786-89. As explained in JWR, section 105(a) of the Mine Act, 30 U.S.C.

815(a), which provides, in part, that an uncontested proposed penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency," does not bar the Commission from granting Rule 60(b)-type relief in appropriate circumstances. 15 FMSHRC at 787-88.

P&M has invoked Rule 60(b)(3), alleging misrepresentation by the Secretary in the proposal of the penalties, and Rule 60(b)(6), asserting that the requested relief would serve the ends of justice. Motions to reopen under Rule 60(b) are committed to the sound discretion of the judicial tribunal in which relief is sought. 15 FMSHRC at 789(citations omitted). For the reasons set forth in JWR, we hold that Rule 60(b) relief is inappropriate in this case. 15 FMSHRC at 789-91. In JWR, the Commission explained that, in a Rule 60(b)(3) motion, misrepresentation must be shown by clear and convincing evidence. 15 FMSHRC at 789. The Commission determined that, because the Secretary's notifications of the proposed penalties stated that the penalties were augmented by the excessive history program, the operator failed to establish misrepresentation by the Secretary. 15 FMSHRC at 789-90.

The Commission also concluded that, although Rule 60(b)(6) provides for relief for "any other reason justifying relief," it cannot be used to relieve a party from the duty to take legal action to protect its interests. 15 FMSHRC at 790. We held that, under the Mine Act, a mine operator is required to make deliberate litigation choices and that failure to contest proposed penalties is at the operator's peril. *Id.* Finally, the Commission concluded that the operator was not entitled to equitable relief because the Commission is not a court of general equity and the operator was less than vigilant in protecting its rights. *Id.*

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Accordingly, for the reasons expressed in JWR, we conclude that P&M failed to clearly and convincingly demonstrate justification for Rule 60(b)(3) or (b)(6) relief or for general equitable relief.

As in JWR, we urge the Secretary to evaluate further the legality and feasibility of providing the refunds sought by P&M. See 15 FMSHRC at 791-92.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner