

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 24, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 2010-150-M
	:	A.C. No. 29-000708-148523 AB8
JAMES HAMILTON CONSTRUCTION	:	
	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) (“Mine Act”). On November 17, 2009, the Commission received from James Hamilton Construction (“JHC”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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).

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 mistake, inadvertence, or excusable

neglect.<sup>1</sup> 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 held 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.<sup>2</sup> *Celite Corp.*, 18 FMSHRC 105, 107 (Apr. 2006) (citations and quotations omitted).

On April 24, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000148523 to JHC. JHC states that on March 31, 2008, it had requested a conference, which MSHA denied on the grounds that the information provided was insufficient. JHC states on April 7, 2008, it again requested a conference providing additional information, but its request was denied as untimely. JHC claims it was unaware of the proposed assessment until it received a call from a collection agency. It subsequently submitted its request to reopen the proposed assessment to the Commission on November 17, 2009.

The Secretary opposes JHC’s request to reopen. She states that the penalty assessment became a final Commission order on May 30, 2008, and asserts that the proposed assessment was successfully delivered by FedEx on April 30, 2008, and that a delinquency notice was mailed July 16, 2008. She also notes that this case was listed as delinquent on another proposed assessment which was subsequently issued and successfully contested by the operator. The Secretary states that because JHC filed its request more than one year after the assessment became a final order, the request should be denied.

Here, although JHC claims it was unaware of the proposed assessment until it was contacted by a collection agency for payment, it appears that the operator did receive the proposed assessment. Moreover, JHC does not identify when it was contacted by the collection

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<sup>1</sup> Rule 60(b) provides that a 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 . . . ;
- (3) fraud . . . ;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

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

<sup>2</sup> Rule 60(c) provides that “[a] motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding. Fed. R. Civ. P. 60(c).

agency or explain the significant delay in filing its request to reopen. At the very least, it appears that JHC had several opportunities to discover the delinquent assessment, but failed to take note of it and address it in a timely fashion.

Finally, because JHC waited over a year to request relief with regard to Proposed Assessment No. 000148523, its motion is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, we deny JHC's request to reopen.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

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