FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2017-97-RM
SIMS CRANE, INC.	:	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY: Althen, Acting Chairman; Young, and Cohen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On December 19, 2016, the Commission received from Sims Crane, Inc. ("Sims") a motion seeking to reopen an Imminent Danger Order that had become a final order of the Commission pursuant to section 107(e)(1) of the Mine Act, 30 U.S.C. § 817(e)(1).

Under section 107(e)(1) of the Mine Act, an operator who wishes to contest an Imminent Danger Order must apply to the Commission within 30 days of issuance. The Commission is then charged with affording the operator a hearing to determine whether the Order should be vacated, affirmed, modified, or terminated. 30 U.S.C. § 817(e)(1).

On September 23, 2015, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued an Imminent Danger Order, No. 8823572, to Sims alleging that a miner was walking without fall protection where there was a danger of falling. A related citation, No. 8823573, was issued on the same day for an alleged violation of 30 C.F.R. § 56.15005.[1]

Pursuant to section 107(e)(1) of the Mine Act, the operator had until October 23, 2015 to apply to the Commission for modification or vacation of the Imminent Danger Order. The operator failed to provide that notification within the statutory period. Sim's motion indicates that it was unaware of the application requirement and that it believed it would have an

[1] 30 C.F.R § 56.15005 provides: "[s]afety belts and lines shall be worn when persons work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered."

opportunity to contest the Order at a later date, in a manner similar to the process for challenging a proposed penalty assessment under section 105(a). However, penalties are not assessed for an Imminent Danger Order under the Mine Act and no further opportunities for challenging Order No. 8823572 existed after the initial 30-day period.

On or about December 3, 2015, Sims received a Notice of Contest Rights and Instructions and a Proposed Assessment (Form 1000-179) from MSHA. Those forms concerned the proposed penalty assessment for Citation No. 8823573 and instructed the operator on the procedures for contesting that assessment before the Commission. Sims checked that it wished to contest all violations listed in the proposed assessment and requested a formal hearing. MSHA received Sims' contest on December 23, 2015. In its motion, Sims asserts that it believed that in contesting the citation and proposed assessment, it was also contesting the Imminent Danger Order.

On February 9, 2016, the operator's contest was docketed as No. SE 2016-81, designated as a simplified proceeding, and assigned to an Administrative Law Judge. On March 25, 2016 and again on June 22 or 23, 2016, Sims filed informational updates regarding this matter. In both of those submissions, the operator requested that both the citation and the Imminent Danger Order be vacated. The Secretary never objected to the inclusion of the Imminent Danger Order in Sims' filings.

On October 28, 2016, counsel for the Secretary filed a Pre-Hearing Report with the Judge. In that report, the Secretary stipulated that, "the citation and imminent danger order at issue in this proceeding were properly served upon Sims as required by the Mine Act . . ." and further that "the citation and imminent danger order at issue in this proceeding may be admitted into evidence by stipulation for the purpose of establishing its issuance." The Secretary also stated that he believed "the single citation and imminent danger order in this $270 docket will be proceeding to trial." Finally, the Secretary asserted, *"[a]ll aspects of this citation and imminent danger order are at issue . . ."* (emphasis added). In Sim's motion to reopen, it asserts that these statements "reaffirmed [its] belief that the Order had been contested and that all stakeholders were aware of it."

On October 31, 2016, the Judge convened a prehearing status call. During that call the Judge raised for the first time the possibility that the Imminent Danger Order had not been timely contested. Notwithstanding the stipulations contained in the Secretary's Pre-Hearing Report, counsel for the Secretary then argued for the first time that the order had not been contested.

On November 14, 2016, a hearing was held in this matter. At the hearing, the Judge again raised the issue of whether the Imminent Danger Order had been contested in a timely manner. The Judge determined that there was no indication in the record of any challenge to the order. The record was left open after the hearing to permit Sims to provide such evidence.

On November 23, 2016, Sims argued in an email to the Judge's office that it had contested the Order at the same time as it had contested the proposed penalty assessment for Citation No. 8823573 because "the Order was referenced by number in the text of the Citation."

On January 13, 2017, the Judge issued his Decision and Order in this matter. The Judge substantively addressed the Secretary's allegations regarding Citation No. 8823573. However, with respect to Order No. 8823572, the Judge noted that the Mine Act and the Commission's procedural rules require an operator to notify the Commission that it wishes to Contest an Imminent Danger Order within 30 days. He determined that marking the proposed assessment regarding the related citation was not the proper procedure for contesting the order. Further, even if it was permissible to challenge an Imminent Danger Order in that fashion, the Judge noted that in this case the operator filed its challenge to the proposed assessment well after the October 23, 2015 deadline. As a result, the Judge ruled that he lacked jurisdiction over the order and declined to address it substantively.

As noted above, on December 19, 2016, Sims filed a Motion to Reopen. In it, Sims requested relief from the final Imminent Danger Order pursuant to Federal Rule of Civil Procedure 60(b)(1), which provides for relief from a final judgement that was entered as a result of "mistake, inadvertence, surprise, or excusable neglect . . . ." Fed. R. Civ. P. 60(b). The operator stated that this rule was incorporated into the Commission Rules. See 29 C.F.R. § 2700.1(b). Sims argued that the assessment form was ambiguous and that it reasonably believed it had properly contested the order when it returned that form. Further, Sims argued that its "intention to contest the Order has always been clear."

On January 18, 2017, the Secretary of Labor filed an Opposition to Sims' Motion to Reopen (which he later amended). In it, the Secretary noted that the Federal Rules of Civil Procedure provide that that such a motion must be filed "within a reasonable time" and that if relief is requested under, *inter alia*, Rule 60(b)(1), the request must be made within a year of the final judgment. It noted that in this case, the order became final in October 2015 and the motion to reopen was filed in December 2016, more than a year after the final order. As a result, the Secretary argued that the motion must be denied.

The Commission has held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders. *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("JWR"). In evaluating requests to reopen final 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. We have also 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, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

When the Commission considers a request to reopen a proposed assessment which has become final, it usually does so in accordance with Rule 60(b)(1), under which a final judgment against a party may be relieved on the basis of "mistake, inadvertence, surprise, or excusable neglect." *See, e.g.*, *KenAmerican Res., Inc.*, 20 FMSHRC 199, 199-200 (Mar. 1998) (illness of safety director and lack of coordination between safety director and accounting department found to be inadvertence or mistake); *Austin Powder Co.*, 33 FMSHRC 581 (Mar. 2011) (operator's

email to counsel requesting filing of contest inadvertently sent to inactive email account). This is the rule cited by Sims in its motion to reopen.

The Secretary correctly notes that pursuant to Rule 60(c)(1), 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." Hence, in cases seeking reopening of a final order, where the basis for the request is mistake, inadvertence, surprise, or excusable neglect, and the request is made more than one year after the order became final, the Commission has denied relief. *See*, *e.g.*, *Newmont USA Ltd*, 31 FMSHRC 808 (July 2009); *J.S. Sand & Gravel, Inc.*, 26 FMSHRC 795 (Oct. 2004).

In the instant matter, it is undisputed that Sims' motion to reopen was filed more than a year after the Imminent Danger Order became final. Thus, under our existing case law, we cannot grant relief using guidance from Rule 60(b)(1). However, that is not necessarily the end of the inquiry. As we have noted previously:

> On past and very infrequent occasions, the Commission has been guided by Rule 60(b)(6), which provides that relief from a judgment or order may be granted for "any other reason that justifies relief." Under Rule 60(b)(6), a motion seeking relief need not be filed within one year from entry of the judgment or order, although it must be filed within a "reasonable time." Fed. R. Civ. P. 60(c)(1). The Commission has considered reopening penalties which had become final pursuant to section 105(a), relying on Rule 60(b)(6), even though the motion had been made more than one year after the penalty has become final. *See, e.g., Brian D. Forbes*, 20 FMSHRC 99 (Feb. 1998) (remanding to judge where individual respondent claimed that he had no actual knowledge of the citation issued against him); *Contractors Sand & Gravel*, 23 FMSHRC 570 (June 2001) (remanding to judge to consider whether "extraordinary circumstances" exist where operator claims that it understood that assessments were included in separate settlement agreement).

Master Products Corp., 33 FMSHRC 645, 647-648 (Apr. 2011).

Master Products concerned an operator's motion to reopen a final penalty assessment under section 105(a) of the Mine Act. 33 FMSHRC at 645. As here, the Secretary opposed reopening on the grounds that the motion was filed more than a year after the order had become final. Nonetheless, upon reviewing the relevant circumstances, we ultimately determined that Rule 60(b)(6) applied to motions to reopen final Commission orders and that such a reopening was appropriate under the circumstances. That is, we determined that there were extraordinary circumstances that justified setting aside the default final order.

In that case, we noted that the operator had received a proposed assessment from the Secretary and had timely filed its contest. 33 FMSRHC at 650. However, it had mailed that contest to the wrong MSHA Office. *Id.* Nonetheless, "[a]ll of the events subsequent to the operator's timely submission led it to reasonably believe that it had properly requested a hearing." *Id.* In fact, MSHA verbally confirmed to the operator that it had received the contest.

We determined that the "operator exercised diligence in pursuing its contest by making several attempts to contact MSHA and inquire as to the status of its case and responding to each correspondence it received from the agency." *Id.* The operator learned that the assessment had become final when it received a delinquency notification. The operator repeatedly contacted MSHA via mail regarding the delinquency, but received no reply. The operator also contacted the collection agency within two days of receiving the delinquency notice to explain that it had contested the citation at issue.

We went on to explain why we found that the operator's motion, while filed over a year after the assessment had become final, was nonetheless made within a reasonable time, as required by Rule 60(c). We noted that for half of the 16-month period of default, the operator was corresponding with MSHA's Civil Penalty Compliance Office and the Department of Treasury's collection agency. 33 FMSHRC at 651. We further noted that the operator had received no response from MSHA despite "clear articulations of its understanding of the situation and express requests." *Id.* We determined that the operator's misapprehension arose from MSHA's inconsistent and misleading communication which would lead a reasonable person to conclude that the case had been properly contested and was being held up by bureaucratic delays. Put succinctly, we stated:

> Nothing in the record indicates that MSHA took any action to correct the operator's clearly-expressed understanding of the circumstances. In relying on the agency's silence and its earlier representations, Master Products failed to take further action within one year of the order becoming final because it reasonably believed that no further action was necessary.

Id. Therefore, we determined that reopening was appropriate.

The situation here is substantially similar. Sims, like Master Products, failed to properly contest an issuance before the Commission and it became a final order.[2] Nonetheless, Sims clearly believed that it had properly contested the Imminent Danger Order when it filed its contest to the related Citation. It consistently referred to both the Citation and the Order in all of its filings and expressed its intention to contest both. Further, Sims acted diligently and pursued its claim rigorously. It provided updates to the court (in which it reiterated its position regarding

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[2] We have elected to proceed pursuant to Rule 60(b) in this case because the Commission has, in previous cases, considered imminent danger orders as though they are "final." *See, e.g., ACI Tygart Valley*, 38 FMSHRC 939 (May 2016). However, it is not certain that the order in this case was "final" in the fatal, legal sense applied to penalties issued pursuant to section 105(b). Unlike that section, section 107 does not contain a clause explicitly rendering an uncontested order a "final order." We believe that treating all penalties and orders as "final" is the better practice and is more consistent with the structure and language of the Act. But the fact that even the Secretary acted as though the imminent danger order remained a viable issue in the case, up until the latter stages of pretrial preparation, certainly renders this case "extraordinary."

the Imminent Danger Order) and participated in pre-hearing procedures. At no time did Sims exhibit anything but a good-faith belief that the Order was docketed for review.[3]

At all relevant times Sim's clearly expressed its understanding that it had properly contested the imminent danger order. What makes this case extraordinary, and therefore worthy of consideration under Rule 60(b)(6), is that MSHA affirmatively endorsed the operator's stated misunderstanding. Indeed, the agency behaved at all times as though it had received a timely contest. Unlike in *Master Products*, where the operator mostly experienced silence from the Secretary following the delinquency notice, the Secretary here prepared for the case as though it would involve the Imminent Danger Order. He even stipulated that the Judge had jurisdiction over the matter and made frequent references to the Order in his Prehearing Report. Further, the issuance here was not assessable and, as a result, Sims never received a delinquency notice that might have provided some indication that the Order had not been properly challenged.

It is clear that Sims took no action in the year following the final order because it reasonably believed that it had properly contested the Imminent Danger Order and was in the process of litigating the matter. Although the Secretary undoubtedly did not intend to deceive Sims, he fostered this mistaken belief. It was only after the one-year deadline had already passed and the Judge raised the issue that the Secretary argued that the Imminent Danger Order had not been contested. Under these circumstances, we conclude that it is appropriate to grant the relief requested by Sims and that that request was made within a reasonable time pursuant to Rule 60(c)(1).[4]

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[3] Sims' failure to contest this issuance here could be characterized as a "mistake." As noted above, mistake is one of the discrete reasons for relief listed in Rule 60(b)(1), which is subject to the one-year rule in Rule 60(c). However, assuming it was a mistake, it was a mistake accompanied by extraordinary circumstances. In *Master Products*, we held that the Rule 60(b)(6) catchall provision could be used to reopen a default judgment over a year old, even if it was the result of "mistake," provided extraordinary circumstances existed. 33 FMSRC at 648-49. In reaching that conclusion, we cited the view of Rule 60(b)(6) taken by federal courts as summarized in 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2864 (2d ed. 2010), which allows for such treatment. We also noted the Seventh Circuit's decision in *Lowe v. McGraw-Hill Cos., Inc.*, 361 F.3d 335 (7th Cir. 2004), in which the Court set aside a default over a year after the judgment pursuant to Rule 60(b)(6) when the default occurred because of a "mistake." We continue to follow that guidance under the exceptional circumstances presented here.

[4] Our dissenting colleague states that reopening this Order will serve no purpose. Slip Op. at 8. We do not agree. MSHA alleged a serious violation – the occurrence of an imminent danger. A section 107(a) violation is an "elevated" order for purposes of the Pattern of Violation Screening Criteria. Pattern of Violation Screening Criteria -2014, https://arlweb.msha.gov/pov/POVScreeningCriteria2014.pdf (last visited June 21, 2017). Standing alone, that is significant. Further, it is impossible to predict how the occurrence of such a violation might affect interests of the charged entity in other areas such as insurance and other litigation. Finally, a person charged with a serious violation of law must have a fair opportunity to contest such a charge. Absent reopening, the events connected with this violation would effectively deprive the operator of such an opportunity despite its clear intention to do so and its

Therefore, in the interest of justice, and based on Rule 60(b)(6), we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

William I. Althen, Acting Chairman

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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good faith and understandable belief that the agency also considered its challenge to be pending before the Commission.

Commissioner Jordan, dissenting:

Sims failed to contest an imminent danger order, and now asks the Commission to allow it to challenge the appropriateness of that enforcement action. Because Sims' request came more than a year after the deadline for seeking review of such order, making relief under F.R.C.P. 60(b)(1) inappropriate, and because it failed to demonstrate "extraordinary circumstances," deserving of relief under F.R.C.P. 60 (b)(6), I would deny the motion.

MSHA issued the imminent danger order on September 23, 2015. The order, written because a truck driver failed to use fall protection, was terminated one minute after it was issued (when the driver dismounted the crane on the truck to ground level). Thereafter, Sims had 30 days in which to file a notice of contest with the Commission. 30 U.S.C. § 817(e)(1); Commission Procedural Rule 22, 29 C.F.R. § 2700.22. It failed to do so.

In deciding whether "extraordinary circumstances" warrant relief in this case, it is useful at the outset to explore the effect of the operator's failure to challenge MSHA's enforcement action. Frankly one is hard-pressed to identify many practical consequences. The order was terminated one minute after it was issued and no penalty was assessed.[5] Not surprisingly, the operator's motion provides no reason why it will be better off if the Commission awards the relief it seeks.

Importantly, Sims has already challenged the citation that was issued in conjunction with the imminent danger order. The citation alleged that Sims violated the standard providing that fall protection be worn when persons work where there is a danger of falling, and a penalty was assessed in conjunction with that MSHA enforcement action.

A hearing was held, and on January 13, 2017, the Administrative Law Judge issued a decision upholding the violation but deleting the designation of "significant and substantial" and reducing the level of negligence and gravity. He also reduced the penalty from the $270.00 proposed by the Secretary to $100. 39 FMSHRC 116 (Jan. 2017). Sims filed a petition for discretionary review of the Judge's finding of a violation. The Commission granted the petition, and the case is currently pending before us.[6]

Therefore, on the issue of whether MSHA properly enforced the fall protection requirement, the operator has had the benefit of a full due process hearing, and will ultimately have appellate review of the Judge's decision. This is in stark contrast to the usual default case

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[5] The operator acknowledges that no penalties are assessed for imminent danger orders. Motion to Reopen, Declaration of W. Ben Hart at 2.

[6] Thus the effect of the majority's decision to grant the motion to reopen is that part of this docket will be remanded to the administrative law judge (on the merits of the imminent danger order) while the other part of the docket (regarding the validity of the citation) will be before the Commission on appeal. This type of inefficient piecemeal litigation has the potential to create confusion. *See Eagle Energy, Inc. v. Secretary of Labor*, 240 F.3d 319, 325 (4th Cir. 2001) (refusing to hear operator's appeal when the Secretary's appeal was still pending before the Commission).

involving a motion under Rule 60, where the operator has not yet had its day in court and the government is nonetheless in the position to collect a penalty.

Turning now to the operator's request for relief, a quick review of the Commission's procedural rules would have demonstrated to the operator that a formal filing of a Notice of Contest with the Commission was necessary to contest the order. Rather than filing such pleading with the Commission, Sims did nothing until December 2015, when it received a proposed assessment from the Secretary on the related citation. It contested the penalty linked to this citation by sending in a form to the Secretary, and in so doing mistakenly believed it had effectively contested the imminent danger withdrawal order. As the operator admits, the failure by Sims to properly contest the imminent danger order "was the result of mistake, inadvertence, and/or excusable neglect." Mot. at 7. This, of course, tracks the language of Federal Rule of Procedure 60(b)(1), on which Sims' motion is based. The majority, in turn, also acknowledges that "Sims' failure could be characterized as a 'mistake.'" Slip op. at 6, n.3.

However, because Sims did not file its motion to reopen until December 2016, more than one year after the imminent danger order should have been contested, relief under Rule 60(b)(1) may not be granted. Fed. R. Civ. P. 60(c)(1); Slip op. at 4.

My colleagues look to a different provision in Rule 60 (one not relied on by Sims) to afford relief to the operator. Under Rule 60(b)(6), relief from a judgment or order may be granted for "any other reason that justifies relief." Such a motion need not be filed within one year from entry of the order. However, it must be filed within a reasonable time. Fed. R. Civ. P. 60(c)(1).

The majority grants grant relief under the stringent test set forth by the Commission and the federal courts when applying this provision. In *Pioneer Investment Serv. Co. v. Brunswick Assoc. Limited Partnership*, 507 U.S. 380 (1993), the Supreme Court set forth the "extraordinary circumstances" standard used in these cases:

> To justify relief under subsection (6), a party must show 'extraordinary circumstances' suggesting that the party is faultless in the delay. . . . If a party is partly to blame for the delay, relief must be sought within one year under subsection (1) and the party's neglect must be excusable.

Id. at 393.

The Commission has also adopted the "extraordinary relief" standard for 60(b)(6) cases. *See Celite Corp.*, 28 FMSHRC 105, 107 (Apr. 2006). My colleagues in the majority appear to agree that this is the proper test. Slip op. at 6, n. 3.

Generally, to be eligible for relief under 60(b)(6), a party must be without fault:

> In a vast majority of the cases finding that extraordinary circumstances do exist so as to justify relief, the movant is completely without fault for his or her predicament; that is the movant was almost unable to have taken any steps that would have resulted in preventing the judgment from which relief is sought.

12 James Wm. Moore et al., Moore's Federal Practice § 60.48[3][b] (3d ed. 2017).

The federal courts have also often emphasized that Rule 60(b)(6) is utilized to prevent extreme hardship. *See e.g. SEC v. North American Clearing, Inc.*, 656 Fed.Appx. 947, 949 (11th Cir. 2016) (holding that relief under 60(b)(6) may be invoked only when an absence of relief will result in "extreme and unexpected hardship"); *Norris v. Brooks,* 794 F.3d 401 (3rd Cir. 2015) (same).

Another black-letter law concept regarding Rule 60(b)(6) is that it cannot be used simply because a party has failed to meet the one-year time limit for filing a motion to reopen under Rule 60(b)(1). Thus, in *John R. Sand and Gravel*, 26 FMSHRC 403 (May 2004), we stated:

> "[The] one-year time limit is an outside time limit for motions requesting relief under subsections (1) through (3), and may not be circumvented by utilization of subsections (4) through (6) of Rule 60(b), which are subject only to a reasonable time limit, when the real reason for relief falls within subsections (1) through (3)."

Id. at 405. *quoting Lakeview Rock Products*, 19 FMSHRC 26, 28-9 (Jan. 1999)

The federal courts are in agreement:

> Of particular concern is that parties may attempt to use Rule 60(b)(6) to circumvent the one-year time limitation in other subsections of Rule 60)(b). . . . Recognizing this concern, we have found that Rule 60(b)(1) and Rule 60 (b)(6) are mutually exclusive, such that any conduct which generally falls under the former cannot stand as a ground for relief under the latter. Where a party's Rule 60(b) motion is premised on grounds fairly classified as mistake, inadvertence, or neglect, relief under Rule 60(b)(6) is foreclosed." [internal quotation marks and citations omitted)]

Stevens v. Miller, 676 F.3d 62, 67 (2d Cir. 2012); *see also* Moore's, § 60.48[2]; *Brandon v. Chicago Board of Education*, 143 F.3d 293, 295-296 (7th Cir. 1998) (holding, in a case where the clerk of the district court consistently sent court mailings to an incorrect address, that the "unusual combination of error by the Clerk's office and neglect by the attorney" were covered by Rule 60(b)(1), and that since (b)(1) applied, Rule 60(b)(6) did not).

In short, this summary of Rule 60(b) jurisprudence indicates that the only way in which Sims may be afforded relief is if the operator can (1) make a showing of "extraordinary circumstances," which includes proving that it was faultless, (2) establish that a denial of relief will result in "extreme hardship," and (3) demonstrate that the reason it deserves relief does not fall under Rule 60(b)(1). A review of the record reveals that this burden was not met.

The central basis of the majority's decision to grant relief is its attempt to transform this garden-variety 60(b)(1) case into a (b)(6) proceeding by placing responsibility squarely at the feet of the Secretary. The majority asserts that, "[w]hat makes this case extraordinary, and

therefore worthy of consideration under Rule 60(b)(6), is that MSHA affirmatively endorsed the operator's stated misunderstanding." Slip op. at 6. Despite the fact that the burden in a Rule 60(b) case is on the operator to show that relief is warranted, the bottom line here is that my colleagues reopen this proceeding because MSHA did not tell Sims that it had not properly contested the issuance of the withdrawal order. In effect they contend that this changes Sims' acknowledged "mistake" into Rule 60(b)(6)-worthy conduct. The effect of shifting this responsibility onto MSHA, is to potentially transform many future 60(b)(1) cases of operator mistake into (b)(6) proceedings (with no one-year time limits) simply because MSHA fails to inform an operator about the problems with its case.

My colleagues base their decision to grant relief specifically on the grounds that the Secretary failed to tell the operator it had erred and MSHA "prepared for the case as though it would involve the imminent danger order." Slip op. at 5-6. As noted above, however, it is not the Secretary's responsibility to tell the operator that it had failed to effectively contest the order (although it is certainly appropriate for a Solicitor to make this argument to a Judge). Moreover, the record does not reflect how the Secretary "prepared for the case." The penalty petition which did not mention Order No. 882352 (because, of course, no penalty is assessed for an imminent danger order), a notice of appearance and prehearing report are the only pre-trial submissions from the Secretary.

The majority also faults the Secretary for referring to the imminent danger order in its prehearing report. Slip op. at 6. But even if the Secretary's prehearing report created confusion regarding the validity of the contest of the order, that confusion was short-lived, because three days later (the next business day after the filing of the Secretary's pre-hearing report), during a conference call, both the Judge and the Secretary questioned whether Sims had properly filed a contest.[7]

Thus the majority fails to make the case that "extraordinary circumstances" exist and that the operator was faultless. It provides no reason why this motion should not be considered under Rule 60(b)(1) (and thus be ruled untimely).

Moreover, the majority's opinion directly conflicts with the Commission's decision in *Celite Corp.* That case involved a late-filed contest of a penalty and a motion to reopen that was filed over a year after the order became final. There had been a miscommunication between counsel for the operator and the Secretary, wherein both apparently failed to realize that the only remedy available to Celite was for the Commission to reopen the order that had gone final, subject to the time limits of Rule 60(b). *Celite Corp.*, at 28 FMSHRC at 107. We denied relief, explaining that "[t]his misunderstanding of well-established Commission law cannot be grounds for relief under Rule 60(b)(6). *Id.* Instead, it is an error that falls squarely within the ambit of Rule 60(b)(1)." We adopted the identical rationale in *Newmont USA Limited*, 31 FMSHRC 808

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[7] The majority also states that the operator is entitled to relief because it acted diligently and pursued its claim rigorously (for instance, it participated in pre-hearing procedures and filed updates to the court). Slip op. at 5-6. However, an operator's responsible litigation of its case has little or nothing to do with whether "extraordinary circumstances" exist to warrant relief under Rule 60(b)(6) and does not remove its actions from the purview of Rule 60(b)(1).

(July 2009), which involved a similar misunderstanding between the operator and the counsel from the U.S. Department of the Treasury who handled the penalty collection matter.[8]

Neither Sims nor the majority argue that a denial of the motion to reopen will result in "extreme hardship," the final factor that must be demonstrated to obtain relief under Rule 60(b)(6)). This is not surprising since, as noted above, the imminent danger order was instantly terminated, and no penalty was assessed.

In conclusion, the majority has failed to demonstrate that Sims' mistake in not following our procedural rules and filing a proper notice of contest of the imminent danger order rises to the level of "extraordinary circumstances." It has also failed to show why the case should not be considered under Rule 60(b)(1). Finally, there is absolutely no showing of hardship to the operator if its motion is denied, since the order was terminated long ago and no allegation of harm has been presented.

By re-opening this matter and sending it back to the Judge (who as previously noted issued his decision on the related citation on January 13, 2017, a decision currently on appeal before us), the majority disregards longstanding Commission and court precedent in this area to reach an outcome that ultimately will have no practical significance. Accordingly, I respectfully dissent.

Mary Lu Jordan, Commissioner

[8] *Master Products*, 33 FMSHRC 645 (Apr. 2011), on which the majority relies, is distinguishable from the instant case. In *Master Products* (a case in which I dissented), the operator mailed a penalty contest to the wrong MSHA office, but MSHA verbally confirmed that it had received the contest. *Id.* at 650. The majority in *Master Products* concluded that the operator failed to take action within one year of the order becoming final because it reasonably believed none was needed due to the agency's silence and earlier representations. *Id.* at 651. Here, nothing occurred within one year of the imminent danger order becoming final that would have led Sims to reasonably believe it had filed a valid contest. MSHA certainly never verbally confirmed that it had and, as demonstrated above, even a cursory reading of our procedural rules would have disabused Sims of the notion that it had properly filed a notice of contest of the imminent danger order with the Commission. (The Secretary's pre-hearing report, on which the majority relies, was filed after the one year period had passed, and, as noted above, any influence it might have had on Sims' belief that it had properly contested the order must have been fleeting, because on the next business day both the Judge and the Secretary raised the possibility that the contest had not properly been filed).

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