FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 29, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2009-746-M A.C. No. 54-00299-139019
MASTER PRODUCTS CORPORATION	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY: Young, Cohen, and Nakamura, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 28, 2009, the Commission received from Master Products Corporation ("Master Products") a letter 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).

On February 6, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000139019 to Master Products. This proposed assessment listed five citations issued on December 26 and 27, 2007, with a total proposed penalty of $5,208.

Before Master Products received the proposed assessment, on or about January 4, 2008, it sent a letter by facsimile to Melody Wesson, a Conference and Litigation Representative in MSHA's Birmingham, Alabama office, requesting a "safety and health conference" on the five citations issued on December 26 and 27, 2007. When Master Products did not receive a response to this letter, on January 24, 2008, the company sent a copy of it to Luis Valentin in MSHA's Guaynabo, Puerto Rico field office. The company did not receive a response to this letter.

On February 19, 2008, Master Products sent a letter by certified mail to the MSHA Birmingham office requesting assistance "to contest and have a formal hearing on all violations listed in proposed assessment case # 000139019." Attached to this letter was a copy of the proposed assessment indicating Master Products wanted "to contest and have a formal hearing on all violations listed in the Proposed Assessment(s)." On March 11, 2008, Master Products received a phone call from an MSHA employee indicating that the company's February 19 certified letter had been received.

Although at this point, Master Products assumed the case "was under review," on or about May 7, 2008, MSHA sent a delinquency notice stating that the assessment had become final, and that the civil penalty was now delinquent. On May 19, 2008, Master Products sent a facsimile to the MSHA Civil Penalty Compliance Office in Arlington, Virginia, attaching copies of its correspondence with MSHA and inquiring about its request for a formal hearing on the violations. The facsimile stated:

> I have a concern related with all delinquent civil penalties and all the catastrophic consequences mentioned in your letters. I diligently and on time sent to your office a request for a Safety and Health Conference. Attached please find all the information that has been sent to you.
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> On March 11, 2008 I received a call from Melody Wesson and she explained to me that MSHA has received the documents I've sent. I understand that MSHA have has (sic) a large backlog of documents to review and I should wait for a conference date.
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> I have not received a date for a formal hearing on all violations; however I continue receiving letters related with civil penalties and payment requests.
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> I would appreciate your help in this matter.

Master Products did not receive a response to this letter.

On September 22, 2008, the company received a collection notice from Progressive Financial Services on behalf of the U.S. Department of the Treasury demanding payment of $6,935.10. Master Products responded to the notice in a letter dated September 24, 2008, explaining its efforts to obtain a formal hearing.

In a letter to the Commission dated July 22, 2009, the company submitted its request to reopen the proposed assessment, although it had not "received any notification, answer or phone calls regarding" the proposed assessment. Master Products fully documented its contentions in this letter.

On August 12, 2009, the Commission received the Secretary's response opposing Master Products' request to reopen. She states that the penalty assessment became a final Commission order on March 22, 2008, and attached the delinquency notice dated May 7, 2008. The Secretary states that Master Products filed its request more than one year after the assessment became a final order and therefore that the request should be denied. The Secretary did not address, or dispute, any of the representations made by Master Products concerning the company's efforts to communicate with MSHA to contest Proposed Assessment No. 000139019.

On August 31, 2009, Master Products again wrote to the Commission in reply to the Secretary's response. The company said that the Secretary's opposition to its motion to reopen "was the first response that we have received to our many efforts."

The Commission has 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. *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).

Usually, when the Commission considers a request to reopen a proposed assessment which has become final by virtue of section 105(a), it 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 ___, slip op. at 2-3, No. SE 2010-468 (Mar. 21, 2011) (operator's email to counsel requesting filing of contest inadvertently sent to inactive email account). However, 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 penalty which has become final by virtue of section 105(a), 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).

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).

Federal court jurisprudence on Rule 60(b)(6) begins with the Supreme Court's seminal decision in *Klaprott v. United States,* 335 U.S. 601 (1949), in which the Court set aside a default judgment entered by a district court many years earlier in a case involving the revocation of the petitioner's certificate of naturalization and American citizenship. The Court held that the language of Rule 60(b)(6) – "any other reason justifying relief from the operation of the judgment" – "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Id.* at 613-15.[1] The Court stated in *Klaprott* that the use of Rule 60(b)(6) is reserved for an "extraordinary situation," and is not to be used in situations covered by the five specified reasons set forth in Rule 60(b)(1) through (5). *Id.* at 613; *see also Ackermann v. United States,* 340 U.S. 193 (1950); *Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847 (1988); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380 (1993). In *Pioneer Investment Services*, the Court quoted with approval the partial dissent of Justice Frankfurter in *Klaprott*:

> Justice Frankfurter, although dissenting on other grounds, agreed that Klaprott's allegations of *inability* to comply with earlier deadlines took his case outside the scope of "excusable neglect" because 'neglect' in the context of its subject matter carries the idea of negligence and not merely of non-action.

Id. at 394 (citation omitted) (emphasis in orignial).

The present view of Rule 60(b)(6) by federal courts is summarized in 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2864 (2d ed. 2010) in the following manner:

> Although it is not easy to fit the later cases into a consistent pattern, in general they seem to follow the flexible approach of the

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[1] We note that the current language of Rule 60(b)(6) – "any other reason justifying relief" – is slightly different, but substantively the same. More significantly, the Commission quoted the Court's language, "such action is appropriate to accomplish justice," with approval in *Chaney Creek Coal Corp.,* 12 FMSHRC 615, 619 (Apr. 1990) so as to grant relief under Rule 60(b)(6) in a discrimination case.

> Karahalias case.[2] The courts have echoed, as they must in the light of Ackermann, the view that clause (6) is reserved for cases involving extraordinary circumstances, and they have said that that clause and the other clauses of the rule are mutually exclusive. At the same time they have acted on the premise that cases of extreme hardship or injustice may be brought within a more liberal dispensation than a literal reading of the rule would allow.

A case in point is *Lowe v. McGraw-Hill Cos., Inc.,* 361 F.3d 335 (7th Cir. 2004). In *Lowe,* the district court had set aside an unjust May, 2001 default order, but had done so under Rule 60(a) as a "clerical error" more than a year after the default order was entered. Writing for the Seventh Circuit, Judge Posner recognized that the judgment was not a clerical error, but rather a mistake, and Rule 60(b)(1) allows relief from a mistaken judgment only within a year of its entry. However, Judge Posner stated, "[w]ith the Rule 60(a) door thus shut, however, the law would be exposed as indeed 'a ass - a idiot,' as Mr. Bumble called it in *Oliver Twist*, if the district judge's mistake could not be corrected under Rule 60(b)." *Id.* at 341. Judge Posner recognized that the "catch-all or safety-valve provision" of Rule 60(b)(6) "mustn't be allowed to override the one-year limitation in Rules 60(b)(1), (2) and (3). *Id.* at 342 (citations omitted). However, he went on to state:

> What then is its scope? The first five subsections seem to cover the waterfront. The only work for (6) to do is to allow judgments to be set aside, without limitation of time, when the circumstances of its invocation are "extraordinary." This is fuzzy, and in tension with the cases that say that Rules 60(b)(1) and 60(b)(6) are mutually exclusive. But the purpose of a catch-all provision, as the term implies, is to avoid tying one's hands in advance, which a rule would do and only a loose standard would securely avoid doing.

Id. Although the default judgment was a "mistake," the Seventh Circuit set it aside under Rule 60(b)(6).

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[2] *United States v. Karahalias,* 205 F.2d 331 (2nd Cir. 1953) involved the petition of a naturalized American citizen to vacate a default judgment cancelling his certificate of naturalization. The petition was brought 17 years after the court action. In remanding the case for further proceedings, Judge Learned Hand first characterized the actions of the petitioner as "excusable neglect," and stated that under Rule 60(b)(6), the court had authority to dispense with the one year limitation period "for situations of extreme hardship." *Id.* at 333. On petition for rehearing by the government, which pointed out that *Klaprott* held that a reason provided under Rule 60(b)(1) could not be the basis for the court to invoke Rule 60(b)(6), Judge Hand retracted his characterization of the petitioner's conduct as "neglect." Judge Hand concluded that the petitioner's conduct should be termed "inaction," and again remanded the case to the district court for further proceedings. *Id.* at 335.

We conclude that this is a case of "extraordinary circumstances" where reopening is warranted under Rule 60(b)(6). Here, Master Products timely submitted its contest of the proposed assessment on February 19, 2008, albeit to the wrong MSHA office.[3] In some circumstances, delivery of a notice of contest of a proposed penalty assessment to another address within MSHA may operate to explain a failure to respond to MSHA's Civil Penalty Compliance Office in Arlington, Virginia.[4] Those circumstances may include situations where the agency acts as though it has received a timely notice of contest.

______All of the events subsequent to the operator's timely submission led it to reasonably believe that it had properly requested a hearing. Master Products asserts, without contradiction, that MSHA communicated with it on March 11, 2008, concerning the company's February 19, 2008 letter (which included a copy of the proposed assessment marked properly to indicate the company's intent to contest all the penalties contained in the assessment). 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. Shortly after its receipt of the delinquency notice in May 2008, Master Products faxed to the Civil Penalty Compliance Office its prior correspondence with MSHA's Regional Offices and a copy of the marked-up assessment form. As quoted *supra*, the operator raised significant questions in this facsimile,[5] and specifically asked MSHA for help. The government never responded. Master Products also promptly acted when it received the collection notice in September 2008 – writing to the collection agency within two days to explain that it had contested the citation at issue. This is wholly consistent with its understanding of the posture of

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[3] Commissioners Cohen and Nakamura would find that Master Products' submission of the timely contest to MSHA's District Office in Birmingham, Alabama constituted an effective contest of the proposed assessment, and thus the assessment never became final under section 105(a) of the Mine Act. *Palmer Coking Coal Co.*, 30 FMSHRC 1076 (Dec. 2008); *DS Mine & Development, LLC*, 28 FMSHRC 462 (July 2006). However, we need not reach that issue.

[4] In *Service Transport, LLC*, the operator sent a contest of a proposed penalty to an office of the Solicitor of Labor and to the Commission. 27 FMSHRC 614, 614-15 (Sept. 2005). The Commission held that Service Transport's contest "constituted timely notification of the Secretary under section 105(a) of the Mine Act of its intention to contest the proposed penalty." *Id*. at 615. The Commission noted in particular that the instructions on the cover sheet accompanying the proposed assessment could be seen as misleading. *Id*. Similarly, the operator in the present case had received a direct communication from MSHA's conference and litigation representative, confirming that the materials – which included a contest of the proposed assessment – had been received. Thus, the operator believed that the case was under review.

[5] Master Products stated, for example, that it understood that the long delay in addressing the citation was a result of the backlog at the Commission. *See* Master Products facsimile cover sheet, fax from Luis Correa to MSHA Civil Penalty Compliance Office, May 19, 2008.

the case. 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.

Finally, we address the fact that Master Products did not seek relief before the Commission for 16 months (March 22, 2008 to July 22, 2009) after the proposed assessment became final. For nearly half of this period, the operator was sending correspondence to the MSHA Civil Penalty Compliance Office and to the collection agency for the Treasury Department. Throughout the period, as shown by the operator's August 31, 2009 letter to the Commission, Master Products had received no response to its inquiries from MSHA despite clear articulations of its understanding of the situation and express requests. In this context, we note that when a party seeks relief from a final judgment or order under the Federal Rules of Civil Procedure, it files a motion with the same court which entered the judgment. In contrast, when an operator seeks reopening of an assessment which has become final under section 105(a) of the Mine Act, it must petition a separate federal agency – the Commission – from the agency which issued the proposed assessment. Although in some situations (e.g., where a contest is filed late), MSHA routinely notifies an operator that it must petition the Commission for relief, no such notification was provided to Master Products. On the contrary, Master Products' misapprehension of the situation arose from silence or communication by the agency which would lead a reasonable person to conclude that the case had been properly contested and was being held up by bureaucratic delays. Moreover, Master Products was unrepresented by counsel, and some of its correspondence in the record is in Spanish.[6] Under the circumstances, we conclude that the operator's request for relief was made within a reasonable time pursuant to Rule 60(c)(1).

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[6] Master Products is located in Puerto Rico.

Therefore, in the interests of justice, 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. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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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

Chairman Jordan and Commissioner Duffy, dissenting:

Master Products delayed more than 16 months before it sent a letter to the Commission seeking to reopen a penalty assessment that had become a final order. Because the operator waited over a year before asking for relief from that final order, we would, consistent with longstanding Commission precedent, deny its request.

As the majority correctly states, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure when evaluating requests to reopen final orders. Slip op. at 3. Our colleagues also correctly note that the Commission has held that a Rule 60(b) motion must be made within a reasonable time, and, under most circumstances not more than one year after the judgment, order or proceeding was entered or taken.[1] *Id.*; *see also Lakeview Rock Prods.*, 19 FMSHRC 26, 28-29 (Jan. 1997).

Here, the proposed assessment became final in March 2008. The operator received a delinquency notice from MSHA in May 2008, and a notice from a collection agency in September 2008. It delayed 10 months after receiving the collection notice before asking the Commission for relief from the final order. It did not seek relief from the Commission until July 2009, well over a year after the proposed assessment became final.

Nonetheless, the majority grants relief and reopens this case, holding, as it must in order to achieve this result, that the operator's actions do not fall under Rule 60(b)(1) ("inadvertence or mistake"). Instead, according to our colleagues, "this is a case of 'extraordinary circumstances' where reopening is warranted under Rule 60(b)(6)." Slip op. at 6. Although we sympathize with our colleagues' compassion for this operator, their effort to transform this case from an ordinary 60(b)(1) proceeding into an "extraordinary" case under 60(b)(6) is unavailing.

Indeed, the majority's decision is completely inconsistent with the Commission's unanimous decision in *Newmont USA Ltd.,* 31 FMSHRC 808 (July 2009). In that case, the operator mistakenly sent its penalty contest form to the incorrect MSHA office within the 30-day contest period. The operator did not ask the Commission for relief until 13 months after the proposed penalties had become a final order. The Commission held that the operator's mistake about where to send the contest form "falls squarely within the ambit of Rule 60(b)(1)" and that because it waited more than a year to seek relief, its motion was untimely. *Id.* at 810.

The Commission has held unequivocally that the "one-year time limit is an outside time limit for motions requesting relief under subsections (1) through (3), and may not be

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[1] 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). As we discuss below, this case falls under Rule 60(b)(1) (under which relief may be granted relief on the grounds of "mistake, inadvertence, surprise, or excusable neglect").

circumvented by utilization of subsections (4) through (6) of Rule 60(b)." *Lakeview Rock Prods.*, 19 FMSHRC at 28. Unfortunately, that is precisely what the majority is doing here.

It has been recognized that generally, cases brought pursuant to clause (6) are attempts to avoid either the one-year time limit in the remaining clauses of Rule 60(b) or time deadlines for other types of relief. 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2864 (2d ed. 2010). Rule 60(b)(1) and (b)(6) are mutually exclusive, *Pioneer Investment Serv. Co. v. Brunswick Ass. Ltd. P'ship,* 507 U.S. 380, 393 (1993), and (b)(6) only applies when there is justification for relief *other* than those set out in the more specific clauses of Rule 60(b). The time limit under 60(b) would be meaningless if the same type of conduct could justify a later motion under Rule 60(b)(6). 12 James Wm. Moore Et Al., Moore's Federal Practice ¶ 60.48[1]-[2] (3d ed. 2010). Thus the majority's efforts to characterize the operator's error in sending its contest to the wrong MSHA office as "extraordinary circumstances" instead of as a "mistake" under 60(b)(1) are well intentioned but misguided.

A final reason why we decline to try to fit this round peg of a 60(b)(1) case into the (b)(6) a square hole is that the operator here is not faultless. In most cases holding that extraordinary circumstances do exist so as to justify relief, the moving party is totally without fault and "almost unable to have taken any steps that would have resulted in preventing the judgment from which relief is sought." Moore's ¶ 60.48[3][b]. As the Supreme Court has recognized, "[i]f a party is partly to blame for the delay [in not taking timely action], relief must be sought within one year under subsection (1) and the party's neglect must be excusable." *Pioneer*, 507 U.S. at 393.

Granting relief and reopening this case after this significant delay contravenes years of well-settled Commission case law. *See, e.g., Newmont USA Ltd.*, 31 FMSHRC at 810; *Celite Corp.*, 28 FMSHRC 105, 107 (Apr. 2006); *J.S. Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004), *Lakeview*, 19 FMSHRC at 28-29. The majority's reliance on the assertion that the operator "reasonably believed that it had timely contested the penalties at issue," does not suffice to overturn years of Commission precedent barring claims such as Master Products' that are filed one year after an order becomes final. Although the operator's confusion regarding the contest procedures is regrettable, we are reluctant to change our longstanding approach in order to accommodate the particular facts of this case. Consequently, we respectfully dissent.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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