FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

July 31, 2009

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2009-395-M
v.	:	A.C. No. 26-02512-130423
NEWMONT USA LIMITED	:	

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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 January 13, 2009, the Commission received a letter from Newmont USA Limited ("Newmont") 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 October 31, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000130423 to Newmont, proposing civil penalties for Citations Nos. 6394861 and 6342286. Newmont states that it paid the penalty for Citation No. 6342286 on November 26, 2007, but that it mistakenly mailed its contest of Citation No. 6394861 along with that payment, rather than sending the contest to a separate MSHA address. The operator states that on May 29, 2008, it received a Notice of Debt from the U.S. Department of Treasury. Newmont explains that on June 2, 2008, it faxed documents demonstrating that it had contested the citation to the counsel listed in the notice as handling the collection effort. On June 4, 2008, Newmont received a letter from that counsel stating that the collection matter was suspended until the dispute was reviewed. On November 10, 2008, Newmont contacted MSHA and was informed that the contest of the citation had not been received in a timely manner, and that the penalty had been referred to Treasury for collection.

The Secretary opposes Newmont's request to reopen Proposed Assessment No. 000130423. She asserts that the penalty assessment became a final Commission order on December 7, 2007, and that the request to reopen was not received by the Commission until January 13, 2009. The Secretary maintains that because the operator filed its request more than one year after the assessment became a final order, the request should be denied. The Secretary further notes that on January 23, 2008, MSHA sent a delinquency notice to Newmont informing the operator that it had failed to timely contest the proposed penalty. The Secretary contends that Newmont failed to explain why, after it was informed that it had not contested the proposed penalty, it took so long to request reopening.

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.[1] *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.[2] *Celite Corp.*, 18 FMSHRC 105, 106 (Apr. 2006) (citations and quotations omitted).

Here, we have been presented with Newmont's failure to timely contest Proposed Assessment No. 000130423 due to its mistake in sending its contest to an incorrect address, followed by a communication between Newmont and counsel in charge of the collection action

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[1] 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).

[2] 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).

where both apparently failed to realize that the only remedy available to Newmont was for the Commission to reopen the order that had gone final, and then only for good cause and subject to the time limits set forth in Rule 60(c). This misunderstanding falls squarely within the ambit of Rule 60(b)(1). *See Celite*, 18 FMSHRC at 107.

Because Newmont waited over a year to request relief with regard to Proposed Assessment No. 000130423, its motion is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, we deny Newmont's request to reopen.

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

Distribution:

Richard Tucker
Compliance & Safety
Newmont Mining Corporation
P.O. Box 669
Carlin, NV 89822-0669

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021