FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

September 7, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2010-496-M
ADMINISTRATION (MSHA)	:	A.C. No. 51-00171-123842
	:	
v.	:	Docket No. WEST 2010-497-M
	:	A.C. No. 51-00192-123798
HAWAIIAN CEMENT MAUI,	:	
CONCRETE & AGGREGATE DIVISION	:	

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 January 8, 2010, the Commission received from Hawaiian Cement Maui, Concrete & Aggregate Division ("Hawaiian Cement") a motion by counsel seeking to reopen two penalty assessments that had become final orders 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 August 1, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment Nos. 000123842 and 000123798 to Hawaiian Cement, proposing civil penalties for various citations, including Citations Nos. 6395603, 6392793, 6395608 and 6395606. Hawaiian Cement states that it filed contests of the four citations, and the contests were subsequently stayed. The operator explains that it was unaware that it was required to contest the penalties in addition to contesting the citations, and that it did not become aware that the assessments had become final orders until after it retained counsel. Hawaiian Cement's General Manager states that the operator has no record of having received the proposed assessments. In addition, Hawaiian Cement states that it did not receive any delinquency notices which would have alerted it that the deadline for contesting the penalties had passed.

The Secretary opposes Hawaiian Cement's request to reopen. She asserts that the penalty assessments became final Commission orders on September 15, 2007, and that the request to reopen was not received by the Commission until January 8, 2010. The Secretary maintains that because the operator filed its request more than two years after the assessments became final orders, the request should be denied. The Secretary further notes in part that the proposed assessments were delivered by certified mail on August 6, 2007, and signed for by Mark Ambre; that MSHA sent delinquency notices to Hawaiian Cement on November 1, 2007, informing the operator that it had failed to timely contest the proposed penalty assessments; and that MSHA received a check dated November 17, 2007, with a notation to apply payment to the two subject cases.

The operator filed a reply to the Secretary's opposition in which Hawaiian Cement maintains that the Commission should grant its request to reopen. The operator clarifies that after it received the delinquency letters, it sent payment for the penalties listed on the proposed assessments, except for those penalties associated with Citations Nos. 6395603, 6392793, 6395608 and 6395606.

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),

[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).

and (3) not more than one year after the judgment, order, or proceeding was entered or taken.[2] *Celite Corp.*, 28 FMSHRC 105, 106 (Apr. 2006).

Here, we have been presented with Hawaiian Cement's failure to timely contest the proposed assessments due to its mistake in believing that it did not need to contest the proposed penalties if it had already contested the underlying citations. This misunderstanding falls within the ambit of Rule 60(b)(1). *See generally Celite Corp.*, 28 FMSHRC at 107. However, because Hawaiian Cement waited more than one year to request relief with regard to the penalties associated with Citations Nos. 6395603, 6392793, 6395608 and 6395606, its motion is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, we deny Hawaiian Cement'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

[2] Rule 60(c)(1) 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)(1).

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