

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 7, 2007

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | Docket No. CENT 2007-273-M |
| v. | : | A.C. No. 03-01875-62140 |
| | : | |
| PARKSTONE | : | |

BEFORE: Duffy, Chairman; Jordan and Young, 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. (2000) (“Mine Act”). On June 21, 2007, the Commission received from Parkstone 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 or about July 14, 2005, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued to Parkstone proposed penalty assessment No. 62140, which covered approximately 12 citations. In its letter, Parkstone alleges that it failed to respond to the penalty assessment because it mistakenly believed that the citations were dismissed as part of other litigation involving MSHA. Parkstone also asserts that MSHA lacks jurisdiction over the activities involved and that MSHA therefore was not entitled to issue the citations at issue. In response, the Secretary states that she opposes reopening the proposed penalty assessment because Parkstone failed to contest the assessment within one year after the assessment had become a final Commission order. S. Resp. at 2-3. She further asserts that, although a reopening request that is based on a claim of lack of jurisdiction may not be time barred by the one-year requirement, Parkstone’s jurisdictional claim is not meritorious. *Id.* at 3.

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 inadvertence or mistake. *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.

Under Rule 60(b)(1), any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered. Fed. R. Civ. P. 60(b). Here, Parkstone has requested reopening the proposed assessment nearly two years after the assessment became a final Commission order and thus would generally be time barred under Rule 60(b). Nevertheless, Parkstone’s additional claim that the final order is void due to lack of Mine Act jurisdiction is not time barred. Unlike other motions under Rule 60(b), there is no time limit with regard to requests to reopen void judgments on the basis of lack of jurisdiction. *Sea-Land Serv., Inc. v. Ceramica Europa II, Inc.*, 160 F.3d 849, 852 (1st Cir. 1998); *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994). Although the Secretary asserts that Parkstone has not asserted a colorable claim of lack of jurisdiction, we are unable to discern from the record before us whether, and to what extent, Parkstone’s activities bring it within the jurisdiction of the Mine Act.

Accordingly, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Parkstone is subject to the jurisdiction of the Mine Act with respect to the subject citations. Taking into account the circumstances of each citation, to the extent it is determined that Parkstone is subject to Mine Act jurisdiction, we instruct the judge to deny Parkstone's request to reopen the assessment as to those citations, as such reopening is time barred under Rule 60(b). Alternatively, to the extent it is determined that Parkstone is not subject to Mine Act jurisdiction, this proceeding must be reopened and the assessment vacated as to those citations that MSHA lacked jurisdiction to issue.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Distribution

Carl E. Parks, President
Parkstone
196 Saint Elizabeth Road
Morrilton, AR 72110

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

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