FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

December 18, 1998

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 99-5-M
	:	A.C. No. 23-02064-05505
GABEL STONE COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, 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. (1994) (AMine Act@). On October 1, 1998, Gabel Stone Company, Inc. (AGabel@) filed with the Commission a request to reopen 19 penalty assessments which had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. ' 815(a).

Gabel explains that, on June 13, it received a collection letter from the Civil Penalty Compliance Office at the Department of Labor=s Mine Safety and Health Administration (AMSHA@). Mot. at 1. The operator states that it was Ashocked to learn@ that MSHA=s enforcement activity had escalated to the point that MSHA sent a collection notice. *Id.* Gabel attached to its request a three-page table listing the date of issuance for each citation at issue, each citation number, and a brief discussion of the reasons Gabel feels each citation deserves review.

On November 6, 1998, the Secretary of Labor opposed Gabel=s request. The Secretary asserts that, while Gabel=s pro se submission has not specified the section or sections of Rule 60(b)[1] of the Federal Rules of Civil Procedure on which it bases its request for relief, the

[1] Rule 1(b) of the Commission=s Procedural Rules provides that the Federal Rules of Civil Procedure shall apply Aso far as practicable@ in the absence of applicable Commission rules. 29

Commission should apply Rule 60(b) to determine if relief is warranted in this case. S. Opp=n at 7. She argues that the operator has failed to satisfy any of the requirements for obtaining relief under that standard. *Id.* at 9 & n.18. The Secretary contends that Gabel=s request is untimely under Rule 60(b)(1) because it falls outside the one-year time limit applicable to motions filed pursuant to that rule, and, in any event, Gabel=s request fails to set forth reasons upon which the Commission could grant relief. *Id.* at 10-11. She also asserts that Gabel=s request fails under

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C.F.R. ' 2700.1(b).

Rule 60(b) states, in pertinent part:

> [T]he 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 which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b).

Rule 60(b)(6) because the operator has not requested relief with a Areasonable time,@ has not shown that it was faultless in the delay, and has failed to present a meritorious defense. *Id.* at 12-16. Finally, the Secretary contends that Gabel=s receipt of the proposed penalties and the operator=s existence for over 30 years weigh against a finding that Gabel was Asurprised@ that its failure to contest the proposed penalty resulted in MSHA=s collection action. *Id.* at 11, 14 n.22.

Under section 105(a) of the Mine Act, 30 U.S.C. ' 815(a), an operator has 30 days following receipt of the Secretary of Labor=s proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary within that time period, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. ' 815(a).

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). Relief from a final order is available in circumstances such as a party=s Amistake, inadvertence, surprise, or excusable neglect.@ Fed. R. Civ. P. 60(b)(1). A Rule 60(b) motion Ashall 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.@ Fed. R. Civ. P. 60(b). This one-year time limit is an outside time limit for motions requesting relief under subsections (1) through (3). *See* 12 James Wm. Moore, Moore=s Federal Practice 60.48[2], at 60-167 to 60-168 (Donald R. Coquillette et al. eds., 3d ed. 1998); *see United States v. Cirami*, 563 F.2d 26, 32 (2d Cir. 1977) (A[W]hen the reason asserted for relief comes properly within one of [the first three] clauses, clause (6) may not be employed to avoid the one-year limitation.@). When the true grounds for relief are based on subsections (1) through (3), the one-year time limit applicable to those sections may not be circumvented by utilization of subsections (4) through (6) of Rule 60(b), which are subject only to a reasonable time limit.

Gabel does not base its request for relief on Rule 60(b) or any of its subsections. *See* Mot. at 1-2. The operator merely asserts that, subsequent to its receipt of a collection notice from MSHA, it learned that the proposed penalties here at issue had become final Commission orders. *Id.* at 1. Gabel also makes a vague allegation that MSHA inspectors became Adefensive@ when disputes arose between Gabel and the inspector regarding MSHA=s enforcement of mandatory standards against Gabel. *Id.* Nonetheless, the explanations offered by Gabel for its failure to file a notice of contest for any of these proposed assessments could be characterized as requests for relief under Rule 60(b)(1) as mistake, inadvertence, surprise, or excusable neglect, or, to the extent that Gabel=s request for relief alleges misconduct on the part of MSHA, within Rule 60(b)(3) as Afraud . . ., misrepresentation, or other misconduct of an adverse party.@ Fed. R. Civ. P. 60(b)(3); *see Lakeview Rock Prods., Inc.*, 19 FMSHRC 26, 28 (Jan. 1997).

However, Gabel=s request is untimely under Rule 60(b)(1) and 60(b)(3). *See Lakeview*, 19 FMSHRC at 29; *Thomas Hale*, 17 FMSHRC 1815, 1816-17 (Nov. 1995); *Ravenna Gravel*, 14 FMSHRC 738, 739 (May 1992); *Pena v. Eisenman Chemical Co.*, 11 FMSHRC 2166, 2167

(Nov. 1989). The certified mail receipts related to the proposed penalty assessments at issue reflect that Gabel received the proposed assessments between June 28, 1993 and February 5, 1996. Pursuant to section 105 of the Mine Act, the last group of these proposed assessments became final Commission orders on March 6, 1996. *See* 30 U.S.C. ' 815(a). Gabel=s motion was filed on October 1, 1998, over two and one-half years after the last of the proposed penalty assessments had become final orders of the Commission. As we previously have recognized, the one-year time limit contained in the first three sections of Rule 60(b) Amay not be extended.@ *Lakeview*, 19 FMSHRC at 29. Furthermore, we note that because Gabel=s request falls within the coverage of either Rule 60(b)(1) or 60(b)(3), analysis under Rule 60(b)(6) is inappropriate here. *See id.* at 28; *Cirami*, 563 F.2d at 32. In any event, Gabel has failed to present sufficient explanation why it is entitled to relief from the final Commission orders. *See Tanglewood Energy, Inc.*, 17 FMSHRC 1105, 1107 (July 1995). Accordingly, we deny Gabel=s request for relief under Rule 60(b).

For the foregoing reasons, Gabel=s request for relief is denied.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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