

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

November 27, 1995

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 90-283-M
	:	
THOMAS HALE,	:	
employed by DAMON CORP.	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1988). On August 13, 1990, the Secretary of Labor filed a petition for assessment of civil penalty, pursuant to section 110(c) of the Mine Act, 30 U.S.C. ' 820(c), against Thomas Hale, general manager of the Valley Sand and Gravel Mine owned by Damon Corporation, alleging that he knowingly authorized, ordered, or carried out five violations of 30 C.F.R. ' 56.14107(a). On March 12, 1991, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Hale for his failure to answer the Secretary's penalty proposal or the judge's Order to Show Cause dated October 30, 1990. The judge assessed civil penalties of \$1,500.

On October 11, 1995, the Commission received a letter from Hale requesting that the case be reopened for hearing. In his letter, Hale acknowledges that the citations had been properly issued but asserts that he is not responsible for payment of the penalties because he had been told by the company's controller that they would be paid. Letter at 1-2. Hale states that he was unaware that the penalties had not been paid until he was contacted in 1991 by a collection office. *Id.* at 3. Subsequently, he was contacted by the Department of Justice regarding the matter. *Id.* Hale asserts that he began to know how to handle the situation only after contacting the local director of the Mine Safety and Health Administration in Vacaville, California, who suggested that he contact the Commission. *Id.* at 3-4.

On October 31, 1995, the Commission received the Secretary's opposition to Hale's

request for relief. The Secretary informs the Commission that the United States filed an action pursuant to section 110(j) of the Mine Act, 30 U.S.C. ' 820(j), in the United States District Court for the Eastern District of California for recovery of the penalty owed by Hale, and that the District Court granted summary judgment in favor of the United States on April 12, 1994. Opp'n at 2-3. Hale filed a motion to set aside the summary judgment, which was denied, and final judgment was entered on May 9, 1995. *Id.* at 3. The Secretary asserts that the time limitations set forth in Fed. R. Civ. P. 60(b) preclude the Commission from considering the case. *Id.* at 9-12.

The judge's jurisdiction over this case terminated when his default order was issued on March 12, 1991. 29 C.F.R. ' 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. ' 823(d)(2); 29 C.F.R. ' 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. ' 823(d)(1). Hale's letter was received by the Commission on October 11, 1995, more than four years after the judge's default order had become a final decision of the Commission.

Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. 29 C.F.R. ' 2700.1(b) (Federal Rules of Civil Procedure apply 'as far as practicable' in the absence of applicable Commission rules); *e.g.*, *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). A motion requesting relief based on such reasons must be made 'within a reasonable time, and . . . not more than one year after the judgment, order, or proceeding was entered or taken.' Fed. R. Civ. P. 60(b).

Hale's request for relief was filed more than four years after the judge's default order became a final decision of the Commission, well beyond the one-year time limit set forth in Rule 60(b) for filing such requests. *See Ravenna Gravel*, 14 FMSHRC 738, 739 (May 1992). Accordingly, the request for relief is denied.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

TALLY SHEET

Hale, employed by Damon Corp., Docket No. WEST 90-283-M

Commissioner

Date

_____ Deny the request for relief from final order (order to that effect attached).

_____ Other:

Comments:

Please return to Lynne Bowman