FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 27, 2004

SECRETARY OF LABOR,	:	Docket No. LAKE 2004-63-M
MINE SAFETY AND HEALTH	:	A.C. No. 20-02957-05509
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2004-64-M
	:	A.C. No. 20-02957-05511
	:	
v.	:	Docket No. LAKE 2004-65-M
	:	A.C. No. 20-02957-05512
	:	
	:	Docket No. LAKE 2004-66-M
JOHN R. SAND AND GRAVEL	:	A.C. No. 20-02957-05513

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, 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. (1994) ("Mine Act").[1] On March 29, 2004, the Commission received from John R. Sand and Gravel ("JR") correspondence that we construe as a motion to reopen four 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).

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers LAKE 2004-63-M, LAKE 2004-64-M, LAKE 2004-65-M, and LAKE 2004-66-M, all captioned *John R. Sand and Gravel* and all involving similar issues. 29 C.F.R. § 2700.12.

The Department of Labor's Mine Safety and Health Administration ("MSHA") issued to JR four proposed penalty assessments. In its motion, JR explains that on January 26, 2004, it received notices of past due penalties. Mot. JR further states that it requested hearings on certain citations and is still awaiting the results of those hearings. *Id.* JR asserts that the penalties were subsequently issued, but the paperwork was misfiled, and was not found until after it received the notices of past due penalties. *Id.* JR explains that it called MSHA after receiving the notice because the proposed penalties "seem very high in lieu of the circumstances leading to the citations." *Id.* JR maintains that it is contesting several citations contained in the proposed penalty assessments it seeks to reopen, and once it receives the results of the hearings and reviews the facts and findings, it can then address the remaining issues. *Id.* JR requests these assessments be reopened so it can have a hearing. *Id.* Attached to its request are copies of the proposed penalty assessments and underlying citations it wishes to contest. Attachs.

The Secretary opposes JR's request to reopen the proposed assessment in Docket No. LAKE 2004-63-M because it was filed almost one year and seven months after the assessment became a final Commission order.[2] S. Resp. at 1. She notes that contrary to JR's assertions, there are no active hearings or conferences on any of these cases, nor have there been since the penalties were issued.[3] Attached to the Secretary's response is a copy of MSHA's delinquent payment notice for A.C. No. 20-02957-05509. Attach A.

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. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

JR's request to reopen the proposed assessment in Docket No. LAKE 2004-63-M was filed more than one year after the assessment became a final order. In *Lakeview Rock Products*, the Commission rejected an operator's request to reopen a proposed penalty assessment that became a final order more than one year before its request was filed. 19 FMSHRC 26, 28-29

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[2] Based on the Secretary's submission, proposed penalty assessment A.C. No. 20-02957-05509 became a final Commission order on July 31, 2002; JR's request to reopen was filed on February 27, 2004.

[3] The Commission has no records of any contests of the citations involved in these proceedings.

(Jan. 1997). The Commission noted 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.' . . . This one-year time limit is an outside time limit for motions requesting relief under subsections (1) through (3), and may not be circumvented by utilization of subsections (4) through (6) of Rule 60(b), which are subject only to a reasonable time limit, when the real reason for relief falls within subsections (1) through (3)."[4] *Id.* at 28 (citation omitted). *See also Klapport v. United States*, 335 U.S. 601, 613 (1949) ("one year limitation would control if no more than 'neglect' was disclosed by the petition"); *Newball v. Offshore Logistics Int'l*, 803 F.2d 821, 827 (5th Cir. 1986) ("'where the reason for relief is embraced in Clause (b)(1), the one year limitation cannot be circumvented by use of Clause . . . (b)(6)'") (citation omitted).

JR's request to reopen the proposed assessment in Docket No. LAKE 2004-63-M under Rule 60(b)(1) is subject to the one-year time bar and is, therefore, untimely. *See Lakeview*, 19 FMSHRC at 28-29; *Thomas Hale*, 17 FMSHRC 1815, 1816-17 (Nov. 1995). Based on the foregoing, we deny JR's motion for relief from the final order in Docket No. LAKE 2004-63-M.

In the interests of justice, we remand Docket Nos. LAKE 2004-64-M, LAKE 2004-65-M, and LAKE 2004-66-M to the Chief Administrative Law Judge for a determination of whether good cause exists for JR's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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[4] Rule 60(b) states, in 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).

Accordingly, we deny JR's request to reopen the penalty assessment in Docket No. LAKE 2004-63-M, and remand Docket Nos. LAKE 2004-64-M, LAKE 2004-65-M, and LAKE 2004-66-M for further proceedings as appropriate.

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Michael F. Duffy, Chairman

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Robert H. Beatty, Jr., Commissioner

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Mary Lu Jordan, Commissioner

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

Distribution

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