

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 8, 2006

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
v. : Docket No. LAKE 2007-13-M
: A.C. No. 47-00811-05508
E.C. VOIT & SONS :

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 October 19, 2006, the Commission received from E.C. Voit & Sons (“Voit”) 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). On November 9, the Secretary of Labor filed a response to Voit’s request.

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 July 31, 2002, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment to Voit for Citation Nos. 6143000, 6144201, 6144203, 6144204, 6144205, 6144206, and 6144207. The operator filed a notice contesting only the proposed penalty assessment for Citation No. 6144206. That citation was ultimately vacated, and the proceedings were dismissed in Docket No. LAKE 2002-155-M. The operator now seeks to reopen the remaining citations that were the subject of that proposed penalty assessment.

The Secretary states in her response that she opposes the Commission granting Voit's request under Rule 60(b) of the Federal Rules of Civil Procedure on the grounds that it was not filed within one year after the proposed penalty assessment became a final Commission order. S. Resp. at 1-2. The Secretary states that Voit's request should also be denied because Voit fails to offer an explanation for its failure to take timely action. Id. at 2.

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. 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 been presented with Voit's failure to timely contest the proposed penalty assessment. Under Rule 60(b), 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).

Because Voit waited more than four years to seek relief, its request is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004)). Accordingly, Voit's request is denied.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Distribution

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