

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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October 30, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket No. SE 2007-1
	:	A.C. No. 01-02901-40618
	:	
DRUMMOND COMPANY, INC.	:	

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 2, 2006, the Commission received from Drummond Company, Inc. (“Drummond”) a motion made by counsel 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 October 13, the Secretary of Labor filed a response to Drummond’s motion to reopen.

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 October 15, 2004, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment to Drummond for Citation No. 7669699. Mot. at 1-2 & Attach. A, 1-2. Drummond intended to contest the penalty but mistakenly failed to do so. Mot. at 1. Drummond did not realize its mistake in failing to contest the penalty until it received a delinquency notice for that and other citations. *Id.* at 2. On September 13, 2006, Drummond mailed to MSHA a check and a cover letter stating that the payment did not include the penalty associated with Citation No. 7669699. *Id.* at 2 & Attach. D. Drummond requests

that the Commission reopen the penalty assessment associated with Citation No. 7669699 and be relieved of any penalties or interest as a result of its mistake. Mot. at 2.<sup>1</sup>

The Secretary states in her response that she opposes the Commission granting Drummond's motion under Rule 60(b)(1) of the Federal Rules of Civil Procedure on the grounds that it was not filed within one year after the proposed penalty assessment at issue became a final Commission order. S. Resp. at 1-2 (citing *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004)). The Secretary notes here that Drummond did not file its request to reopen until more than one year and ten months after a final Commission order. S. Resp. at 2. Therefore, the Secretary concludes that the Commission should deny Drummond's request.<sup>2</sup> *Id.*

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 Drummond's unexplained failure to timely contest the proposed penalty assessment. This is the type of error that falls squarely within the ambit of Rule 60(b)(1). However, 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).

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<sup>1</sup> Drummond also requests that it be relieved of interest and penalties in two other cases, A.C. 000040162 and A.C. 000052560, which were paid on September 13, 2006, because those cases were "a result of the same mistake" as in the proceeding at bar. Mot. at 2.

<sup>2</sup> The Secretary also states that she opposes Drummond's request to be relieved of any interest and fees with respect to penalty assessments in A.C. Nos. 000040162 and 000052560, which is comparable to a request to reopen a penalty assessment, because that request was filed more than one year and five months after final Commission orders. S. Resp. at 2-3.

Because Drummond waited well over a year to request relief, its motion is untimely. *J S Sand & Gravel*, 26 FMSHRC at 796. Accordingly, Drummond's motion is denied.<sup>3</sup>

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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<sup>3</sup> We do not reach Drummond's request to be relieved of interest and penalties in A.C. 000040162 and A.C. 000052560 because the underlying penalty assessments constitute final Commission orders and Drummond has not made a motion to reopen those proceedings. In any event, if it had, we see no material difference between those proceedings and the instant one, in terms of whether relief from the final orders is warranted.

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