FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR

WASHINGTON, D.C. 20006

July 13, 1995

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. WEVA 93-277, etc.
	:	Case Nos. 46-06329-03607, etc.
v.	:	
	:	
TANGLEWOOD ENERGY, INC.,	:	
and	:	
FERN COVE, INC.	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, 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. (1988) ("Mine Act"). On March 28, 1995, the Commission received from Tanglewood Energy, Inc. and Fern Cove, Inc., a Request for Relief from Final Commission Orders and Late-Filed Petition for Discretionary Review. In the motion, the operators seek to reopen 119 cases, each of which involves either an uncontested civil penalty assessment that had become a final order of the Commission by operation of section 105(a) of the Mine Act, 30 U.S.C. ' 815(a), or a default order issued by a Commission administrative law judge that had become final pursuant to section 113(d)(1) of the Mine Act, 30 U.S.C. ' 823(d)(1). The operators request relief on the basis of "excusable neglect" in accordance with Fed. R. Civ. P. 60(b)(1) (ARule 60(b)(1)@).[1] The operators attached the affidavit of Randy Burke, president of

[1] Rule 60(b) provides, in part:

> [T]he court may relieve a party . . . from a final judgement, order, or proceeding

both corporations. Mr. Burke's affidavit addresses the contested cases and his failure to seek counsel during the course of proceedings in these cases.

On April 20, 1995, the Commission received the Secretary of Labor's opposition to the request. The Secretary argues that the Commission lacks jurisdiction to reopen the orders that have become final by operation of section 105(a) of the Mine Act. S. Opp'n at 4-7. He asserts that, even if the Commission has jurisdiction, it should deny the request because the operators have failed to set forth adequate grounds for relief under Rule 60(b)(1). *Id.* at 7-8. The Secretary submits that the majority of the cases are time-barred under the time limitations set forth in Rule 60(b). *Id.* at 9-10. He also contends that, in any event, the operators did not offer an explanation for their failure to file notices of contest to the proposed penalty assessments and that the explanation for their default is not clear and convincing evidence of excusable neglect. *Id.* at 10-13. The Secretary argues that, in fact, the operators are seeking relief under Rule 60(b)(1) because an action to collect the penalties was filed in the United States District Court for the Northern District of West Virginia on January 10, 1995. *Id.* at 2-3, 14-15.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary's proposed penalty assessment to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to timely provide such notice, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. ' 815(a). Here, because the operators failed to contest the proposed assessments in 94 of the subject cases, those assessments became final orders of the Commission.

Between March 28, and August 24, 1994, default orders were entered in the remaining 25 cases due to the operators' failure to file appropriate responsive pleadings to the Secretary's penalty proposals or to the judge's show cause orders. 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). Under section 113(d)(1) of the Mine Act, a decision becomes a final decision of the Commission if the Commission does not direct its review within 40 days of its issuance. The Commission did not direct review of the default orders; thus, they became final orders of the Commission between May 7, 1994, and October 3, 1994.

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for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; . . . .

Fed. R. Civ. P. 60(b)(1).

The Secretary, in opposing relief, relies on the language of section 105(a) of the Mine Act, which provides: "If, within 30 days . . . the operator fails to notify the Secretary that he intends to contest the . . . proposed assessment of penalty, . . . [it] shall be deemed a final order of the Commission and not subject to review by any court or agency." 30 U.S.C. ' 815(a).[2] The Commission has held that, in appropriate circumstances, it possesses jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources,*

[2] That provision is also set forth in Commission Procedural Rule 27. 29 C.F.R. ' 2700.27.

Inc., 15 FMSHRC 782, 786-89 (May 1993); *Peabody Coal Co.*, 16 FMSHRC 2030, 2031 (October 1994); *Pit*, 16 FMSHRC 2033, 2034 (October 1994); *Lakeview Rock Products, Inc.*, 16 FMSHRC 2388, 2389 (December 1994). We reject the Secretary's argument that the Commission lacks such jurisdiction.

Relief from a final Commission order is available to a party under Rule 60(b)(1) in circumstances including mistake, inadvertence, or excusable neglect. 29 C.F.R. ' 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules). A motion requesting relief based on such allegations 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). Rule 60(b) motions are committed to the sound discretion of the judicial tribunal in which relief is sought. *Randall v. Merrill Lynch*, 820 F.2d 1317, 1320. (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988). *See also Tolbert v. Chaney Creek Coal Corp.*, 12 FMSHRC 615, 619 n.1 (April 1990). Rule 60(b) is "the mechanism by which courts temper the finality of judgments with the necessity to distribute justice" and "is a tool which trial courts are to use sparingly. . . ." *Randall*, 820 F.2d at 1322; *Pit*, 16 FMSHRC at 2034.

The operators offer no explanation, either in the motion or in their president's affidavit, attached thereto, for their failure to contest the proposed assessments. Thus, they have failed to set forth grounds establishing that Rule 60(b)(1) relief is appropriate for the uncontested assessments that became final by operation of section 105(a) of the Mine Act. Their request for relief as to these final orders is denied.

As to the 25 default orders issued by the administrative law judge, the operators argue that they failed to file appropriate pleadings due to an "inadequate understanding of the legal process involved and the fraudulent procedure for contesting citations and penalties." Mot. at 4-5. Their lack of understanding of the legal process does not provide sufficient grounds to justify relief under Rule 60(b)(1) and they offer no explanation of their statement concerning "fraudulent" contest procedures. Accordingly, their request for relief as to the default orders is also denied.

For the foregoing reasons, the operators' motion is denied.[3]

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

[3] Chairman Jordan and Commissioner Marks also find the operators' motion untimely. It was received by the Commission on March 28, 1995, approximately 5 to 10 months after the judges' default orders had become final, and only after the United States Attorney's Office had already filed actions to collect penalties proposed in the final orders. They conclude that the operators have failed to file their motion within a reasonable time. *See Wadding v. Tunnelton Mining Co.*, 8 FMSHRC 1142, 1143 (August 1986).