FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

June 15, 2001

SECRETARY OF LABOR,	:		
MINE SAFETY AND HEALTH	:		
ADMINISTRATION (MSHA)	:		
	:		
v.	:	Docket Nos.	WEST 2000-421-M
	:		WEST 2000-422-M
	:		WEST 2000-423-M
	:		WEST 2000-424-M
	:		WEST 2000-425-M
CONTRACTORS SAND & GRAVEL	:		WEST 2000-426-M
INCORPORATED	:		WEST 2000-427-M

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Beatty, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On June 5, 2000, the Commission received a request from Contractors Sand & Gravel, Inc. ("Contractors") to reopen 11 proposed penalty assessments that have become final orders of the Commission. The Secretary of Labor opposes Contractors' request for relief. For the reasons that follow, the Commission denies Contractors' request as to

one of the proposed assessments,[1] and remands for further consideration the remaining ten proposed assessments.[2]

In its request, Contractors seeks to reopen 11 proposed penalty assessments, totaling $2,073 for 24 alleged violations, which were originally issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") between July 6, 1993 and May 7, 1998. Six of the 11 proposed penalty assessments became final orders of the Commission, pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a), thirty days after Contractors failed to submit a hearing request ("green card") to contest the alleged violations.[3] The Commission received Contractors' letter between two to six years after the six uncontested proposed assessments had become final orders of the Commission.

As to the remaining five proposed assessments, Contractors timely filed a green card, but failed to answer the Secretary's petitions for assessment of penalties.[4] Former Chief

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[1] The Commission's decision on this penalty assessment which has become a final order (A.C. No. 04-03404-05520 in Docket No. WEST 2000-427-M) is evenly divided. Chairman Jordan and Commissioner Beatty would deny the operator's request for relief and affirm the final order. Commissioners Riley and Verheggen would grant the operator's request and vacate the final order. The effect of the split decision is to leave standing the final Commission order. *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd*, 969 F.2d 1501 (3d Cir. 1992).

[2] Commissioners Riley and Verheggen would grant Contractors' request as to all 11 proposed penalty assessments. However, for the reasons set forth in their opinion, Commissioners Riley and Verheggen join Commissioner Beatty in remanding the ten proposed assessments. Chairman Jordan would deny Contractors' request as to all 11 proposed assessments.

[3] These six proposed penalty assessments are as follows:

Docket No.	A.C. No.	Assess. Date	Final Date
WEST 2000-423-M	04-04679-05513	3/17/94	4/17/94
	04-04679-05515	6/12/96	7/12/96
WEST 2000-427-M	04-03404-05516	1/11/94	2/11/94
	04-03404-05517	7/15/94	8/15/94
	04-03404-05519	5/29/96	6/29/96
	04-03404-05520	5/7/98	6/7/98

[4] These five proposed penalty assessments are as follows:

Docket No.	A.C. No.	Assess. Date	Default Date	Final Date
WEST 2000-421-M	04-04679-05511	7/7/93	2/16/94	3/28/94
WEST 2000-422-M	04-04679-05512	11/3/93	6/23/94	8/2/94

Administrative Law Judge Paul Merlin issued show cause orders directing Contractors to answer the Secretary's petitions within 30 days, and entered default against Contractors after it failed to respond to the judge's show cause orders. The judge's jurisdiction in these matters terminated when he issued his default orders between February 16 and June 23, 1994. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, 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). The judge's default orders regarding these five assessments became final between March 28 and August 2, 1994. The Commission received Contractors' letter approximately six years after the judge's five default orders had become final Commission orders.

Contractors asserts that it failed to contest the 11 proposed assessments because it believed that they were included in a decision after remand approving settlement issued by Administrative Law Judge August Cetti on May 28, 1996.[5] Mot.; C. Reply. It contends that the government waited four to five years to raise the matter and that Contractors has no way of determining what the claims relate to other than their date and the section of the Secretary's regulations cited. Mot. Contractors requests that the Commission reopen these proposed assessments. *Id.* Attached to its request are various documents, including correspondence with

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WEST 2000-424-M	04-03404-05513	7/6/93	2/16/94	3/28/94
WEST 2000-425-M	04-03404-05514	8/13/93	3/3/94	4/12/94
WEST 2000-426-M	04-03404-05515	10/18/93	6/7/94	7/17/94

[5] Previously, the Commission granted Contractors' request to reopen nine unrelated civil penalty proceedings, which had been defaulted and become final orders, and remanded the proceedings to the judge to determine whether default was warranted. *Contractors Sand & Gravel, Inc.*, 16 FMSHRC 1645, 1646 (Aug. 1994). Of the nine proceedings remanded, Judge Cetti vacated the alleged violation in Docket No. WEST 94-409-M, and one alleged violation in Docket No. WEST 93-462-M, retaining jurisdiction of the remaining two citations in that proceeding. *Contractors Sand & Gravel, Inc.*, 18 FMSHRC 384, 389 (Mar. 1996) (ALJ). Judge Cetti subsequently approved the settlement of 27 violations, including the two remaining violations in Docket No. WEST 93-462-M, as well as the other eight dockets reopened by the Commission in its August 1994 decision. *Contractors Sand & Gravel, Inc.*, 18 FMSHRC 824, 825-26 (May 1996) (ALJ).

Consequently, Contractors filed a suit against the Secretary for attorney's fees and costs in Docket No. WEST 94-409-M, pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 et seq. (1994) ("EAJA"), and was ultimately successful. *Contractors Sand & Gravel, Inc.*, 18 FMSHRC 1820 (Oct. 1996) (ALJ), *rev'd* 20 FMSHRC 960 (Sept. 1998), *rev'd Contractors Sand & Gravel, Inc. v. FMSHRC*, 199 F.3d 1335, 1340-43 (D.C. Cir. 2000), *enforced*, 22 FMSHRC 367 (Mar. 2000) *and* 22 FMSHRC 561 (Apr. 2000) (ALJ).

the United States Department of Treasury, Judge Cetti's decisions in the underlying matters (*see* n.3 supra), the 11 proposed penalty assessments, the subject default orders, and MSHA reports. Attachs.

On June 14, 2000, the Commission received the Secretary's opposition to Contractors' request. The Secretary argues that the request should be denied because Contractors has failed to satisfy any of the requirements for obtaining relief under Fed. R. Civ. P. 60(b). S. Opp'n at 4-13. Specifically, the Secretary contends that if Contractors' request for relief falls under Rule 60(b)(1) through (3), its request is time-barred because it has been filed more than one year after its final date, and the Secretary asserts that Rule 60(b)(4) through (6) cannot be used to circumvent that bar. *Id.* at 6. The Secretary also asserts that Contractors could not have "honestly felt" that the 11 penalty assessments were included in the judge's May 28, 1996 settlement decision because three penalties were issued after that decision. *Id.* at 9. The Secretary argues that Contractors' request also fails under Rule 60(b)(6) because it was not made within a reasonable time; Contractors has not shown, by clear and convincing evidence, that it was faultless in the delay; and Contractors' mistaken belief that the settlement of the EAJA case included the 11 penalty assessments at issue is not a legally sufficient reason for failing to take action. *Id.* at 10-12. The Secretary also contends that Contractors' request must fail because it has not established a meritorious defense to the underlying action. *Id.* at 12.

In reply, Contractors clarifies that two of its non-metal surface mining operations, the Montague Plant and the Scott River Plant, have been closed for approximately one and three years, respectively. C. Reply.[6] It claims that only one citation, not three as the Secretary contends, was issued after the judge's decision approving settlement. *Id.* Contractors contends that its failure to contest the penalty assessment was not deliberate, but that it was honestly led to believe by representations made by its attorney and the Solicitor's attorney that the settlement for $1,960 included the penalties at issue. *Id.* Finally, Contractors asserts that it is entitled to relief under Rule 60(b) for surprise because the government waited more than five years to bring this matter to its attention. *Id.* Accordingly, Contractors requests that the Commission review this matter and "dismiss or amend it." *Id.*

The Commission has recognized that, in appropriate cases, it may grant various forms of relief from final Commission orders. *Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (May 1993) (citing *Johnson v. Lamar Mining Co.*, 10 FMSHRC 506, 508 (Apr. 1988)) ("*JWR*"); *M.M. Sundt Constr. Co.*, 8 FMSHRC 1269, 1270-71 (Sept. 1986). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *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. The Commission has also

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[6] On June 21, 2000, the Commission received from Contractors a request for an extension of time to file a reply to the Secretary's opposition. The Commission granted Contractors' request and accepted Contractors' reply for filing on July 12, 2000. Unpublished Order dated July 12, 2000.

observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). Rule 60(b) provides that motions made pursuant to the section "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 limitation is an outside time limit for motions requesting relief under subsections (1) through (3). *See* 12 James W. Moore et al., *Moore's Federal Practice* ¶ 60.65 (3d ed. 2000) ("*Moore's*"). It may not be circumvented by utilization of subsection 60(b)(6), which is subject only to a reasonable time limit, when the real reason for relief falls within subsections (1) through (3). *Id.*

Contractors' claim that it believed that the 11 proposed penalty assessments had been settled along with other outstanding violations assessed against it while its EAJA proceeding was pending could be construed as allegations of mistake, inadvertence, or excusable neglect under Rule 60(b)(1). Due to multiple civil penalty proceedings, complicated EAJA proceedings, and a settlement agreement involving 27 violations, Contractors and its counsel may have been confused as to which violations, if any, remained outstanding. The Commission previously has vacated a final order and remanded the matter to the judge for further fact-finding where the operator claimed it failed to timely file a hearing request because it believed civil penalties were the subject of a settlement agreement; it was unfamiliar with Commission procedure; or it misunderstood representations made to it by its attorney, MSHA, or the Secretary. *See, e.g.*, *DeAtley Co., Inc.*, 18 FMSHRC 491, 492 (Apr. 1996) (remanding where operator believed penalties had been settled); *Ogden Constructors, Inc.*, 22 FMSHRC 5, 7 (Jan. 2000) (remanding to a judge where the operator failed to timely submit a hearing request due to a mistaken belief that no action was necessary because the citation was the subject of an ongoing MSHA investigation); *Dean Heyward Addison*, 19 FMSHRC 681, 682-83 (Apr. 1997) (remanding to a judge where the movant failed to timely submit a hearing request due to unfamiliarity with Commission procedure and misunderstanding about information from the Secretary's counsel and ALJ).

In addition, Contractors' claim that its attorney and the Secretary's attorney made representations during settlement negotiations that led it to believe that all pending proposed assessments were included in the settlement could be construed as an allegation of fraud, misrepresentation, or misconduct under Rule 60(b)(3). Relief under Rule 60(b)(3) has been provided in circumstances involving either intentional or unintentional conduct, which prevented the moving party from having a full opportunity to litigate its case fairly. *See, e.g.*, *Lonsdorf v. Seefeldt*, 47 F.3d 893, 895 (7th Cir. 1995) (stating that Rule 60(b)(3) applies to both intentional and unintentional misrepresentations); *Bros., Inc. v. W. E. Grace Mfg. Co.*, 351 F.2d 208, 210-11 (5th Cir. 1965) (interpreting misconduct under Rule 60(b)(3) to incorporate accidental omissions); *see generally Moore's*, § 60.43[1][b]-[c]. The Commission has noted that fraudulent conduct under Rule 60(b)(3) must be proven by clear and convincing evidence. *JWR*, 15 FMSHRC at 789; *Pena v. Eisenman Chem. Co.*, 11 FMSHRC 2166, 2167-68 (Nov. 1989) (denying miner's request for relief because it was untimely and failed to provide "clear and

convincing evidence" of fraud or misconduct where miner alleged that operator defrauded him in the settlement of his discrimination suit); *Wadding v. Tunnelton Mining Co.*, 8 FMSHRC 1142, 1143 (Aug. 1986) (finding that miner's request for relief pursuant to Rule 60(b)(3) was not filed within a reasonable period of time and that he failed to provide "clear and convincing evidence" of operator's alleged fraud during hearing).

To the extent that Contractors' request does not fall within Rule 60(b)(1) or (3), "extraordinary circumstances" pursuant to Rule 60(b)(6) could exist which may have arguably contributed to its lack of knowledge of the exclusion of the subject proposed penalty assessments from the judge's decision approving settlement until it recently received notice from the Treasury Department. *See Lakeview Rock Prods., Inc.*, 19 FMSHRC 26, 28 (Jan. 1997) (providing that relief under Rule 60(b)(6) is granted only when the reasons for relief are other than those set out in the more specific clauses (1) through (5)); *see also Brian D. Forbes*, 20 FMSHRC 99, 101-03 (Feb. 1998) (remanding to judge to determine whether miner, who filed request for relief nearly four years after order became final, is entitled to relief where he did not receive notices of penalty assessment which were sent to his employer and returned to MSHA unclaimed); *Tolbert v. Chaney Creek Coal Corp.*, 12 FMSHRC 615, 618-19 (Apr. 1990) (holding that reopening final Commission decision under Rule 60(b)(6) for supplemental proceedings in aid of compliance with final Commission decision is "appropriate to accomplish justice"). However, if Contractors received notice or was at fault for failing to receive notice, then such failure to timely respond may amount to mistake or inadvertence under Rule 60(b)(1), and cannot be claimed as "extraordinary circumstances" under Rule 60(b)(6). *Compare Klapprott v. United States*, 335 U.S. 601, 604-09, *as modified in*, 336 U.S. 942 (1949) *with Ackermann v. United States*, 340 U.S. 193, 195-97 (1950) (demonstrating that extraordinary circumstances justifying relief have been found where movant suffered undue hardship or injustice but not where movant was at fault); *see also Johnson*, 10 FMSHRC at 508 (reopening final order approving settlement upon showing that underlying settlement agreement approved by Commission had been breached or repudiated). Because Contractors was represented by counsel during the time of the settlement and EAJA proceeding, its actions are subject to a higher level of scrutiny and standard of diligence. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 397 (1993) (examining the conduct of both respondent and counsel to determine whether failure to file proof of claim by bar date can constitute excusable neglect); *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962) (providing that client usually bears consequences of negligence of his or her attorney).

As to ten of the 11 proposed assessments,[7] the record is insufficient to determine whether Contractors' claims should be treated as mistake, inadvertence, or excusable neglect under Rule 60(b)(1); whether the representations that Contractors claims were made by the Secretary could qualify as misrepresentations within the meaning of Rule 60(b)(3); or if not within the purview of Rule 60(b)(1) or (3), whether extraordinary circumstances exist under Rule 60(b)(6). It is unclear from the record what happened during the course of settlement negotiations, particularly given Contractors' failure to specify the statements made by its counsel and the Secretary's counsel which led it to believe that the proposed assessments were included in the settlement agreement. In addition, there may have been other grounds, not attributable to the fault of Contractors, that would have reasonably led it to believe that the decision approving settlement included all remaining citations issued by the date of the decision. The remaining proposed assessment (A.C. No. 04-03404-05520) and underlying citation were issued after the judge's decision approving settlement. Thus, even if Contractors' claim fell within Rule 60(b)(1), (3), or (6), relief would not be appropriate as to that proposed assessment because there is no reasonable basis for Contractors' claim that the settlement agreement included that proposed assessment or the underlying citation.

If Contractors' motion amounts to a request for relief under Rule 60(b)(1) or (3), Contractors' request must be denied as untimely. *See Hale employed by Damron Corp.*, 17 FMSHRC 1815, 1816-17 (Nov. 1995); *Ravenna Gravel*, 14 FMSHRC 738, 739 (May 1992); *Pena*, 11 FMSHRC at 2167. However, if Contractors' motion is rightfully brought pursuant to Rule 60(b)(6), the record is insufficient to determine whether it was filed within a reasonable time. There is not enough evidence in the record to determine whether Contractors had good reason for failing to take action sooner or whether the delay would cause prejudice to the Secretary.[8] *Forbes*, 20 FMSHRC at 103 (remanding to judge to determine whether miner who filed request for relief four years after final order is entitled to relief); *Clarke v. Burkle*, 570 F.2d 824, 831 (8th Cir. 1978) (providing that prejudice to opposing party is a factor to consider when determining whether a motion for relief has been filed within a reasonable time under Rule 60(b)(6)); *McKinney v. Boyle*, 447 F.2d 1091, 1093 (9th Cir. 1971) (providing that another consideration is whether the moving party has good reason for failing to take action sooner).

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[7] I include in these ten proposed assessments the two penalty assessments (A.C. Nos. 04-04679-05515, 04-03404-05519) as to which the citations were issued before the judge's May 28, 1996 decision approving settlement, but the proposed penalties were issued after that decision. Although the proposed assessments had not yet been issued at the time of the settlement decision, Contractors may have believed that the settlement decision included all citations issued by the date of the decision. *See Contractors*, 18 FMSHRC at 825 (judge's decision approving settlement) ("the parties . . . filed an amended motion to approve a settlement agreement of *all* the remaining citations") (emphasis added).

[8] It has been administratively determined that while the Commission and the Secretary no longer have the original files in these proceedings, MSHA has retained copies of the records in these matters. The availability of other evidence is not clear from the record.

For the foregoing reasons, Contractors' request for relief as to one of the proposed assessments, A.C. No. 04-03404-05520 in Docket No. WEST 2000-427-M, is denied. With regard to the remaining ten proposed assessments, on the basis of the present record, I am unable to evaluate the merits of Contractors' position. In the interest of justice, the Commission remands for further consideration the proposed assessments in Docket Nos. WEST 2000-421-M through 2000-426-M, and A.C. Nos. 04-03404-05516, 04-03404-05517, and 04-03404-05519 in Docket No. WEST 2000-427-M to the judge, who shall determine whether relief from final order is warranted. If the judge determines that relief is appropriate, the case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Robert H. Beatty, Commissioner

Commissioners Riley and Verheggen, concurring in part and dissenting in part:

For the reasons set forth below, we would have vacated all eleven of the penalty assessments at issue in this default matter. But to avoid the effect of a divided decision, which would allow the default orders to stand, we join our colleague Commissioner Beatty in remanding ten of the eleven penalty assessments (Docket Nos. WEST 200-421-M through WEST 2000-426-M, and A.C. Nos. 04-03404-05516, -05517, and -05519 in Docket No. WEST 2000-427-M). We do not join our colleague, however, in denying Contractors' request for relief as to the penalty assessment set forth in A.C. No. 04-03404-05520 in Docket No. WEST 2000-427-M, which we would also vacate.

The eleven penalty assessments at issue in this default matter were based on a total of 24 citations and orders issued against Contractors Sand and Gravel, Inc. ("Contractors"), the majority of which (19) were issued between March and August 1993. Of the remaining five citations and orders, two were issued in 1994 and one each was issued in 1995, 1996, and 1997, respectively.[1] We find the dates of the violations underlying the penalties at issue, the majority of which were cited almost *eight years ago*, significant for a variety of reasons.

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[1] The following is a summary of the default penalties at issue in this matter, arranged according to MSHA control number ("A.C. Number"). The number in parentheses following the date on which the underlying citations or orders were issued is the number of violations involved:

Uncontested Penalties

A.C. No.	Date(s) Underlying Paper Issued	Date Assessed
04-04679-05513	03/12/93 (1)	03/17/94
04-04679-05515	06/07/95 (1)	06/12/96
04-03404-05516	06/07/93 (1), 08/18/93 (2)	01/11/94
04-03404-05517	05/03/94 (2)	07/15/94
04-03404-05519	03/05/96 (1)	05/29/96
04-03404-05520	06/25/97 (1)	05/07/98

Contested Penalties

A.C. No.	Date(s) Underlying Paper Issued	Date Assessed	Final Date of Default
04-04679-05511	05/26/93 (1), 06/08/93 (2)	07/07/93	03/28/94
04-04679-05512	06/08/93 (1)	11/03/93	08/02/94
04-03404-05513	06/07/93 (5)	07/06/93	03/28/94
04-03404-05514	06/07/93 (1)	08/13/93	04/12/94
04-03404-05515	06/07/93 (2), 08/18/93 (3)	10/18/93	07/17/94

We believe that these penalties, and the violations on which they are based, must be viewed in the larger context of relations between the Secretary and Contractors during these years. On or around March 10, 1993, MSHA Inspector Ann Frederick visited Contractors Montague Plant to investigate a matter involving accident reports. Deposition of Eric Schoonmaker in *Contractors Sand & Gravel Supply, Inc.*, Docket No. WEST 93-462-M, at 56-57 (July 1995).[2] An argument ensued between Schoonmaker and Frederick when Schoonmaker challenged Frederick's attempt to go through certain files. *Id*. at 57. Schoonmaker testified that Frederick "stomped out of there [saying] 'You're going to see how tough I can be.'" *Id*. Schoonmaker further testified that Frederick subsequently issued 75 citations against Contractors. *Id*. at 59.

One of these citations led to a lengthy and contentious litigation. First, in a decision the Secretary did not appeal, Commission Administrative Law Judge August Cetti vacated one of the citations Frederick issued, along with a related section 110(c) charge against Schoonmaker, on cross motions for summary decision. *Contractors*, 18 FMSHRC at 389. When, pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 et seq. (1994) ("EAJA"), Contractors applied for the attorney's fees and costs it incurred in defending this case, Judge Cetti granted the company's application. *Contractors Sand and Gravel, Inc.*, 18 FMSHRC 1820 (Oct. 1996) (ALJ). On review, the Commission reversed the judge in a three to two vote, the majority concluding that the Secretary's position in the underlying Mine Act proceeding was substantially justified. *Contractors Sand and Gravel, Inc.*, 20 FMSHRC 960, 967-76 (Sept. 1998). The dissenting Commissioners held that the Secretary failed to establish that her position was substantially justified. *Id*. at 978-85 (Commissioners Riley and Verheggen).

Contractors appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit. The court reversed the Commission, concluding that the Secretary's position before the administrative law judge in the Mine Act proceeding lacked substantial justification because the Secretary's interpretation and application of the regulation at issue had no reasonable basis in law or fact. *Contractors Sand and Gravel, Inc. v. FMSHR*C, 199 F.3d 1335, 1340-42 (D.C. Cir. 2000). The court ordered that the award of fees and expenses granted by the administrative law judge be restored, and remanded the case to the Commission for further proceedings to determine the amount of an award to compensate Contractors for pursuing review before the court. *Id.* at 1343. Before its mandate issued, the court clarified that its decision was not intended to preclude Contractors from seeking "compensation for attorneys' fees and expenses incurred in defending the award of the [judge] before the . . . Commission." Order at 2 (Mar. 3, 2000).

After the Commission remanded the case to the judge (*Contractors Sand and Gravel, Inc.*, 22 FMSHRC 367 (Mar. 2000)), the parties entered into settlement discussions to resolve

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[2] This deposition was entered into the record of the cited proceedings unchallenged by the Secretary. *Contractors Sand & Gravel Supply, Inc.*, 18 FMSHRC 384, 386-87 (Mar. 1996) (ALJ).

their longstanding dispute. *Contractors Sand and Gravel, Inc.*, 22 FMSHRC 561 (Apr. 2000) (ALJ). One would have expected the Secretary, during those negotiations, to at least acknowledge the pendency of the eleven additional penalties now before us. At any rate, on remand, the parties "agreed that a total amount of $99,935.51 in fees and expenses" would be paid by the Secretary to Contractors. *Id*. Nothing in the judge's decision approving the parties' agreement alludes to the existence of other matters still in dispute.

All of the penalties at issue in this default proceeding are thus based on enforcement actions taken against Contractors either when a certain degree of acrimony apparently existed between MSHA and the company, especially during 1993, or during the pendency of the EAJA litigation. In our view, the Secretary has all the appearances of a sore loser, battered from her loss in the EAJA proceedings, seeking now as long as almost eight years after the fact to exact what appears to be a measure of revenge on Contractors.

The legislative history of the Mine Act sets forth the purpose of the Act's civil penalty provision, section 110(i), 30 U.S.C. § 820(i), as follows:

> The purpose of . . . civil penalties, of course, is not to raise revenues for the federal treasury. . . . [T]he purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards.

S. Rep. No. 95-181, at 40-41 (1977) (also discussing "the objective of [inducing] effective and meaningful compliance"), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 628-29 (1978). *See also Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1565 n.17 (Sept. 1996) (recognizing importance of deterrent function of civil penalties). The legislative history of section 110(i) makes clear that civil penalties are remedial in nature, not punitive, and are assessed to induce "effective and meaningful" compliance with safety and health standards. We find troubling that the effort to collect the eleven penalties in this case after so long a delay has the appearance of being punitive.

But appearances aside, the Secretary has advanced no good reason for having failed to prosecute these penalties and seek payment in a more timely fashion.[3] Indeed, what we find most troubling here is the Secretary's delay in attempting to enforce the penalties.

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[3] A Civil Penalty Collection Report dated March 4, 1999 contains all of the eleven penalties at issue. We also note that the Secretary has made no effort to recover the penalties at issue "in a civil action in the name of the United States . . . in the United States district court for the district where the violation[s] occurred or where the operator has its principal office." 30 U.S.C. § 820(j).

Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the Act]" (30 U.S.C. § 820(i)), and to the Secretary the duty of proposing penalties (30 U.S.C. §§ 815(a) & 820(a)). Under this statutory scheme, the Secretary proposes penalties based on the section 110(i) penalty criteria, and the Commission ultimately assesses penalties either by operation of law,[4] or by order. Ultimately, a penalty proposal made by the Secretary "should assist the Commission in efficiently exercising [its] authority [to assess penalties]." *Sec'y of Labor on behalf of Hannah v. Consolidation Coal Co.*, 20 FMSHRC 1293, 1300-01 (Dec. 1998). Here, we do not believe that the Secretary assisted the Commission at all. Instead, in the context of the numerous actions brought against Contractors in a relatively short time, the numerous settlements that were agreed to (*see* slip op. at 3 n.5), and the lengthy EAJA litigation, what we find in this record is a confused mess that could confound anyone, and certainly justify to some extent Contractors' failure to pay the penalties. These loose ends ought to have been tied up much, much earlier. In fact, the delays in this case run directly counter to "the thrust of the penalty procedures under the Mine Act . . . to reach a final order of the Commission assessing a civil penalty for violations *without delay*." *Sec'y of Labor on behalf of Bailey v. Ark.-Carbona Co.*, 5 FMSHRC 2042, 2046 (Dec. 1983) (emphasis added).[5]

[4] When an operator, after receiving notice of a proposed penalty, elects not to challenge the proposal, the Commission plays no active role in the penalty determination. Instead, such a proposed penalty becomes a "final order of the Commission" by operation of law. 30 U.S.C. § 815(a).

[5] The Chairman states that she sees "no reason why the Secretary would have needed to address the question of the timing of her collection efforts" because Contractors, as the moving party, bears the burden of persuasion here. Slip op. at 16. In light of the undisputed record, however, of just how long ago the penalties at issue were assessed, we believe the Secretary was duty-bound to offer a detailed explanation to "assist the Commission in efficiently exercising [its] authority [to ultimately assess penalties]." *Hannah*, 20 FMSHRC at 1301.

In light of the foregoing concerns, we would have vacated all eleven penalties under Rule 60(b)(6) of the Federal Rules of Civil Procedure in the interests of justice and because to not do so would be to make a mockery of the deterrent purposes underlying the Commission's authority to assess civil penalties under section 110(i) of the Mine Act. An eight year delay in attempting to collect a penalty robs any such penalty of any deterrent purpose. Unfortunately, however, we must join Commissioner Beatty in remanding these penalties to avoid having them stand as a sorry monument to administrative inefficiency.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Chairman Jordan, concurring in part and dissenting in part:

For Contractors Sand and Gravel, Inc. ("Contractors") to obtain relief from the 11 final orders at issue here, it must, as a threshold matter, adequately explain why it failed to timely file a hearing request (or "green card") for six proposed penalty assessments that became final orders of the Commission between February 1994 and June 1998. It must also explain why it failed to respond to both the Secretary's petition for assessment of penalty and the judge's show cause orders in five additional cases that became final orders of the Commission in 1994. Because it did not provide sufficient justification for missing these deadlines, I would deny its request.

Contractors' sole claim is that it thought these matters were resolved as part of a settlement order issued by the judge on May 28, 1996. Mot. This could be construed as an allegation of mistake or inadvertence justifying relief under Fed. R. Civ. P. 60(b).[1] However, its assertion that it mistakenly thought these cases were part of a settlement in 1996 does not justify why it failed to act in 1993 and 1994, which is the relevant time period for eight of the proceedings.[2] For example, Contractors is seeking relief from a default order the judge issued in February 1994 (A.C. No. 04-04679-05511 in Docket No. WEST 2000-421-M) due to its failure

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[1] As Commissioner Beatty notes, slip op. at 4, the Commission looks to Rule 60(b) for guidance in cases where a party requests that the Commission grant relief from a final order. *See Close Const. Co. Inc.*, 23 FMSHRC 378, 379 (Apr. 2001). It provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative 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. The 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.

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

[2] The eight cases (A.C. Nos. 04-04679-05511 through 05513, and A.C. Nos. 04-03404-05513 through 05517) all became final in 1994.

to respond to the judge's show cause order issued in October 1993. Therefore, it must describe the events of October and November of 1993 that would excuse its failure to respond to the judge's show cause order. However, it offers no explanation at all.

Furthermore, a settlement that was approved on May 28, 1996 does not provide an excuse for failing to respond to a penalty assessment issued in the ninth case (A.C. 04-0304-05520) in Docket No. WEST 2000-427-M, almost two years later on May 7, 1998. Accordingly, I join Commission Beatty in denying relief as to that assessment.

There appears to be only two proceedings in which Contractors' duty to respond occurred close in time to the settlement agreement. Docket No. WEST 2000-427-M includes a penalty assessment that was issued on May 29, 1996 (A.C. No. 04-03404-05519), and Docket No. WEST 2000-423-M includes a penalty assessment (A.C. No. 04-04679-05515) issued on June 12, 1996. But even if Contractors could plausibly argue that it thought these penalty assessments had been incorporated into the settlement agreement, it should have offered some evidence to show that it made an effort to verify that they were included. Contractors was represented by an attorney in that May 1996 settlement. It would have been a simple matter for it to pick up the phone and call its attorney to clarify whether these two other assessments were part of that settlement. Its motion for relief, however, is silent on this question.

In any event, as Commissioner Beatty correctly points out, Contractors is not entitled to relief under Rule 60(b)(1) because of its one-year time bar. Slip op. at 7.[3] Thus its claim that it mistakenly believed that these 11 cases were included in the settlement cannot prevail.

Relief is also not warranted under Rule 60(b)(6), which requires that a motion for relief be filed "within a reasonable time." Contractors provides no argument as to why its delay of two to six years in requesting relief should be considered "reasonable." Mot. Furthermore, for a party to prevail on a 60(b)(6) claim, it "must show 'extraordinary circumstances' suggesting that the party is faultless in the delay." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 393 (1993). In most cases granting relief due to extraordinary circumstances, "the movant is completely without fault for his or her predicament; that is, the movant was almost unable to have taken any steps that would have resulted in preventing the judgment from which relief is sought." 12 James W. Moore et al., *Moore's Federal Practice*, § 60.48[3][b] (3d ed. 2000). Here, to the contrary, Contractors has offered absolutely no reason why it was not at fault for missing its deadlines in 1993 and 1994. Although Commissioner Beatty suggests that "there *may* have been other grounds, not attributable to the fault of Contractors, that would have

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[3] I do not agree with Commission Beatty that Contractors' allegation regarding statements by its attorney and the Secretary's attorney during settlement negotiations could even arguably constitute fraud, misrepresentation or misconduct presenting a claim for relief under Rule 60(b)(3). Slip op. at 5. In any event, like the Rule 60(b)(1) claim, any claim under Rule 60(b)(3) would also be barred due to the one year time limit for motions requesting relief under that section. Slip op. at 7.

reasonably led it to believe that the decision approving settlement included all remaining citations issued by the date of the decision" slip op. at 7 (emphasis added), Contractors has provided us with nothing that supports that assertion except a one-sentence declaration that it relied on the representations of its attorney and the Solicitor's lawyer. C. Reply.

In any event, relief under Rule 60(b)(6) is justified only when the basis for relief is other than those set forth in the more specific clauses of 60(b)(1) through (5). *See Cotto v. United States,* 993 F.2d 274, 277-78 (1st Cir. 1993). As the Commission has made clear, the one-year time limit for motions requesting relief under subsections (1) through (3) may not be circumvented by using subsections (4) through (6). *Lakeview Rock Prods., Inc.* 19 FMSHRC 26, 28 (Jan. 1997). Here, Commissioner Beatty's articulation of Contractors' potential claim under Rule 60(b)(6) (" '[E]xtraordinary circumstances' pursuant to Rule 60(b)(6) could exist which may have arguably contributed to its [Contractors'] lack of knowledge of the exclusion of the subject proposed penalty assessments from the judge's decision approving settlement. . . ."), slip op. at 6, is almost the mirror image of his characterization of Contractors' claim under Rule 60(b)(1) ("[Contractors] believed that the 11 proposed penalty assessments had been settled along with other outstanding violations assessed against it. . . ."). Slip op. at 5. His characterization of both claims centers around the same mistaken belief or lack of knowledge regarding the status of the eleven penalty assessments vis a vis the May 1996 settlement. Consequently, relief under Rule 60(b)(6) is not appropriate.

With all due respect, I also disagree with Commissioners Riley and Verheggen's approach in this case, which would grant Contractors relief from all 11 of the default orders due to a presumed delay in the Secretary's enforcement efforts and a presumption of retaliatory motive on her part. Slip op. at 11-12. I am frankly puzzled by their statement that what is "most troubling here is the Secretary's delay in attempting to enforce the penalties," slip op. at 11, when it is not clear from the record when collection attempts were made. While I would also find the allegedly lengthy time period between the defaults and the collection proceeding troubling, I do not view it as a rationale for granting Contractors relief under 60(b).

In their opinion, my two colleagues turn the burden of proof for a Rule 60(b) case on its head. They complain that "the Secretary has advanced no good reason for having failed to prosecute these penalties and seek payment in a more timely fashion." Slip op. at 11. Given that Contractors is the moving party requesting relief here, I see no reason why the Secretary would have needed to address the question of the timing of her collection efforts. On the other hand, although it is Contractors which has asked for relief from the final orders, my colleagues' opinion never discusses Contractors' failure to litigate these 11 cases. They make no mention of, much less evaluate, the "reasonableness" of Contractors' years-long delay in coming to us for relief. They are also completely silent about Contractors' assertion that it believed all 11 citations were resolved in the May settlement. They thus would award "extraordinary relief" to a party without anywhere in their opinion alluding to or analyzing its role in this litigation. Such a one-sided approach to a request for equitable relief is unprecedented.

In sum, I would deny relief with regard to all of the final orders.

Mary Lu Jordan, Chairman

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