FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 25, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2006-266-M
	:	A.C. No. 04-02848-33115
v.	:	
	:	
CELITE CORPORATION	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

ORDER

BY: Duffy, Chairman; Jordan and Young, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 8, 2006, the Commission received from Celite Corporation ("Celite") 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). The Secretary filed a response to Celite's motion on March 13, 2006, and Celite filed a reply to the Secretary's response on March 14, 2006.

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 28, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Celite for Citation No. 6361283, issued to the company by MSHA on March 23, 2004. Mot. at 1-2 & Attach. Celite states in its motion that it had already timely contested the citation. *Id.* at 1. That contest is the subject of Docket No. WEST 2004-258-RM, which is currently before Commission Chief Administrative Law Judge Robert J. Lesnick, who stayed the case on May 14, 2004 pending the assessment of a penalty. Celite states that it contested the proposed penalty assessment at issue on September 28,

2004, which the company concedes was untimely. Mot. at 2; Aff. of B. Coggin.

Celite states in its motion that through counsel, it was subsequently informed that counsel for the Secretary in the contest case "would not oppose the contest of the proposed penalty on the ground that it was not timely." Mot. at 2. In her response, the Secretary asserts that her counsel "did *not* discuss the untimely contest in question," S. Response at 2 (emphasis in original), an assertion Celite disputes in its reply, C. Reply at 2. Celite states that based upon this purported conversation, it "presum[ed] that a petition for assessment of a penalty . . . would follow in due course," and that it thereafter "engaged in informal discovery and settlement negotiations" with the Secretary. Mot. at 2.[1]

The Secretary states in her response that she opposes the Commission granting Celite'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. Response at 2; *see J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004) (denying several requests to reopen filed more than one year after the penalty proposals at issue had become final orders, noting that under Rule 60(b) of the Federal Rules of Civil Procedure, 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). However, the Secretary states that she would not oppose the company's motion being granted under Rule 60(b)(6) of the Federal Rules of Civil Procedure on the basis of "any other reason justifying relief." S. Response at 3.

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. In *Liljeberg v. Health Services Acquisition Corp.*, the Supreme Court noted that Rule 60(b)(6) "provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice,'" though "also cautioning that it should only be applied in 'extraordinary circumstances.'" 486 U.S. 847, 864 (1988) (citations omitted). In *Johnson v. Lamar Mining Co.*, the Commission held that "in appropriate circumstances the Commission may, in its discretion, reopen one of its proceedings pursuant to Fed. R. Civ. P. 60(b)(6) upon a proper showing that an underlying settlement agreement

[1] The Secretary also asserts that in a letter dated October 1, 2004 and addressed to Celite, MSHA informed the company that although it had received the company's contest of the penalty assessment at issue, it was untimely and that the penalty assessment had thus become a final order of the Commission. S. Response at 1. In its reply, Celite states that "it has no knowledge of the October 1, 2004 letter," and counsel for Celite states "he never received a copy of MSHA's October 1 letter." C. Reply at 3.

approved by the Commission [had] been materially breached or repudiated." 10 FMSHRC 506, 508 (Apr. 1988). *See also Tolbert v. Chaney Creek Coal Corp.*, 12 FMSHRC 615, 618-19 (Apr. 1990) (following *Johnson*).

The Commission has also held 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)." *Lakeview Rock Products, Inc.*, 19 FMSHRC 26, 28 (Jan. 1997). *See also Klapprott v. United States*, 335 U.S. 601, 613 (1949) ("one year limitation would control if no more than 'neglect' was disclosed by the petition").

Here, we find no extraordinary circumstances that would justify granting the relief requested. Instead, we have been presented with Celite's unexplained failure to timely contest the proposed penalty assessment, followed by a miscommunication between counsel for Celite and the Secretary where both counsel apparently failed to realize that the only remedy available to Celite was for the Commission to reopen the order that had gone final, and then only for good cause and subject to the time limits set forth in Rule 60(b). This misunderstanding of well-established Commission law cannot be grounds for relief under Rule 60(b)(6). Instead, it is an error that falls squarely within the ambit of Rule 60(b)(1).[2]

[2] Even under Rule 60(b)(1), such an error of law is generally not a grounds for reopening as most courts look upon it as inexcusable neglect. *See* 12 James Wm. Moore et al., *Moore's Federal Practice* § 60.41[1][c][iii] (3d ed. 1997).

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

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

Commissioner Suboleski, dissenting:

I would grant relief from the final order in the penalty proceeding that is sought by Celite. It is evident to me that the October 2004 communications, which closely followed the untimely penalty contest that was filed on September 28, between the Secretary's counsel and counsel for Celite led to the confusion that resulted in inaction in the penalty proceeding for nearly one and one-half years. *Compare Jim Walter Res., Inc.,* 15 FMSHRC 782, 790 (May 1993) (Rule 60(b)(6) relief unavailable where operator's decision not to contest penalty was a "deliberate choice[]"). In the meantime, the related litigation on the underlying citation has been on stay for nearly two years, pending assessment of the penalty. In light of the admitted confusion of the parties over their discussion of the penalty and the inaction by the Commission in moving the citation proceeding on its docket, I conclude that the events surrounding the reopening of the penalty assessment constitute "extraordinary circumstances," pursuant to Rule 60(b)(6), that would justify relief. *See Contractors Sand & Gravel, Inc.*, 23 FMSHRC 570, 575 (June 2001).

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Stanley C. Suboleski, Commissioner

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