

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 20, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2006-460-M
v.	:	A.C. No. 26-02302-44079
	:	
GOLDEN PHOENIX MATERIALS, INC.	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, 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 June 22 and July 5, 2006, the Commission received two letters from Golden Phoenix Materials, Inc. (“Golden Phoenix”) requesting that the Commission 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).

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 November 29, 2004, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) sent to Golden Phoenix the proposed penalty assessment at issue. The company states that it contested the “MSHA decision” “within the allotted time period,” and that MSHA received the contest, but that it “may not have been properly forwarded to the relevant department.” The Secretary of Labor states that she does not oppose Golden Phoenix’s request for relief.

On the record before us, we are unable to determine whether Golden Phoenix timely contested the proposed penalty assessment. If the company did so, the proposed assessment has not become a final order of the Commission and the company’s request for relief would be moot.

However, if Golden Phoenix failed to timely contest the proposed assessment, we would not be able to grant the relief requested. Under Rule 60(b) of the Federal Rules of Civil Procedure,<sup>1</sup> any motion for relief from a final order 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). Here, Golden Phoenix has requested reopening of a proposed assessment more than one year after it became a final Commission order if the company did not file a timely contest. *See JS Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004) (denying request to reopen filed more than one year after penalty proposals had become final orders).

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<sup>1</sup> 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). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *Id.* at 787.

Accordingly, we remand this matter to the Chief Administrative Law Judge for a determination of whether Golden Phoenix timely contested the proposed penalty assessment at issue. If it is determined that the company did file a timely contest, the Chief Judge shall order further proceedings as appropriate pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. If it is determined that Golden Phoenix failed to timely contest the proposed assessment, the Chief Judge shall dismiss this proceeding.

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

Distribution

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