

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

January 21, 1997

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 97-38-M
	:	A.C. No. 42-01975-05509
LAKEVIEW ROCK PRODUCTS, INC.	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C.

¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

' 801 et seq. (1994) (Mine Act). On December 2, 1996, Lakeview Rock Products, Inc. (Lakeview) filed with the Commission a Motion to Reopen Case and for Relief from Order Assessing Penalty, and a supporting Memorandum of Points and Authorities. In the motion, Lakeview seeks to reopen a penalty assessment issued by the Department of Labor's Mine Safety and Health Administration (MSHA) that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. ' 815(a). Lakeview asserts that it is entitled to relief under Fed. R. Civ. P. 60(b)(5) and (6).² Lakeview attaches the affidavits of its secretary and treasurer, Gary V. Smith, and its attorney, Gregory M. Simonsen. Smith's affidavit addresses Lakeview's failure to submit a request for hearing (Green Card) to contest the alleged violations.

The Secretary of Labor opposes the request, arguing that Lakeview has failed to satisfy any of the requirements for obtaining relief under Fed. R. Civ. P. 60(b). S. Opp'n at 4-6. The Secretary also contends that Lakeview's request is untimely, since it actually seeks relief based upon a claim of mistake under Rule 60(b)(1), or misconduct by the adverse party under Rule 60(b)(3). *Id.* at 5. According to the Secretary, Lakeview's motion is therefore subject to the one-year time limitation applicable to motions filed pursuant to Rule 60(b)(1), (2), or (3), which cannot be avoided by invoking a different subsection, such as Rule 60(b)(6). *Id.* In response, Lakeview contends that the Secretary has attempted to mischaracterize its motion as one brought pursuant to Rule 60(b)(1) and (3), and maintains that it has demonstrated its entitlement to relief under Rule 60(b)(5) and (6). L. Reply Mem. at 5-7.

Under section 105(a) of the Mine Act, 30 U.S.C. ' 815(a), an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify

² Rule 1(b) of the Commission's Procedural Rules provides that the Federal Rules of Civil Procedure shall apply as far as practicable in the absence of applicable Commission rules. 29 C.F.R. ' 2700.1(b).

Rule 60(b) states, in part:

[T]he court may relieve a party . . . 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.

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

the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary within that time period, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

Lakeview failed to file its hearing request in this case because of its mistaken belief that the citations at issue in this case would be covered by the Green Card it had submitted in another case involving a different citation that arose out of the same inspection, conducted on May 2, 1994. *See* L. Mem. at 4, & 14; Affidavit of Gary V. Smith && 9-12. Although the basis for Lakeview's failure to file a Green Card in this case appears to qualify as a mistake, inadvertence, or excusable neglect within the meaning of Rule 60(b)(1), Lakeview seeks relief pursuant to subsections (5) and (6) of Rule 60(b). Lakeview asserts that it is entitled to relief under Rule 60(b)(5) because three of the citations involved in this case are virtually the same as a prior citation (Citation/Order No. 4170702) that was later vacated by an administrative law judge following a hearing. L. Mem. at 8. Lakeview also asserts that it is entitled to relief under Rule 60(b)(6) because the citations involved herein are also included in two other penalty assessments that are being contested by two employees who are agents of Lakeview. *Id.* at 8-9. In addition, Lakeview contends that it is entitled to relief under Rule 60(b)(6) because it has been faced with an avalanche of citations and assessments, the number and severity of which are out of proportion to Lakeview's safety record and were the result of unconscionable conduct of MSHA's inspectors and their supervisor in attempting to make an example of Lakeview. *Id.* at 9-10.

The Commission has held that, in appropriate circumstances and pursuant to Rule 60(b), it possesses jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (September 1994). As noted above, relief from a final order is available in circumstances such as a party's mistake, inadvertence, surprise, or excusable neglect (Rule 60(b)(1)), or fraud . . . , misrepresentation or other misconduct of an adverse party (Rule 60(b)(3)). 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. Fed. R. Civ. P. 60(b). 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). 7 James Wm. Moore et al., *Moore's Federal Practice* § 60.28[2], at 60-316 to 60-317 (2d ed. 1996). *See Newball v. Offshore Logistics Int'l*, 803 F.2d 821, 827 (5th Cir. 1986) (where the reason for relief is embraced in Clause (b)(1), the one year limitation cannot be circumvented by use of Clause . . . (b)(6) (quoting *Gulf Coast Bldg. & Supply Co. v. IBEW, Local No. 480*, 460 F.2d 105, 108 (5th Cir. 1972)); *United States v. Cirami*, 563 F.2d 26, 32 (2d Cir. 1977) (when the reason asserted for relief comes properly within one of [the first three] clauses, clause (6) may not be employed to avoid the one-year limitation); *Brown v. Burnside*, 109 F.R.D. 412, 413 (E.D.N.Y. 1986) (if a case falls within Rule 60(b)(1), a party cannot avoid the one-year time limit by characterizing it as falling within Rule 60(b)(6); *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@).

Despite its attempt to characterize its motion as one brought pursuant to Rule 60(b)(5) and (6), the explanation offered by Lakeview for its failure to file a Green Card in this case appears to fall squarely within the coverage of Rule 60(b)(1) (or possibly Rule 60(b)(3) to the extent that it alleges unconscionable conduct or other misconduct on the part of MSHA). Lakeview's motion was filed on December 2, 1996 (*see* 29 C.F.R. ' 2700.5(d)), more than two years after the proposed penalty assessment became a final order of the Commission. The motion is therefore untimely under Rule 60(b). *See Thomas Hale*, 17 FMSHRC 1815, 1816-17 (November 1995); *Ravenna Gravel*, 14 FMSHRC 738, 739 (May 1992); *Pena v. Eisenman Chemical Co.*, 11 FMSHRC 2166, 2167 (November 1989). As we have previously recognized, the one year time limit contained in Rule 60(b) may not be extended. *See Pena v. Eisenman Chemical Co.*, 11 FMSHRC at 2167. Accordingly, we deny Lakeview's request for relief under Rule 60(b).

For the foregoing reasons, Lakeview's request for relief is denied.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner