

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

November 27, 2006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. WEST 2006-548-M
	:	WEST 2006-549-M
v.	:	WEST 2006-550-M
	:	
LAKE VIEW ROCK PRODUCTS, INC.	:	

BEFORE: Duffy, Chairman; Jordan 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”).<sup>1</sup> On August 24, 2006, the Commission received from Lake View Rock Products, Inc. (“Lake View”) three motions made by counsel to reopen penalty assessments that had become final orders 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).

A. Docket Nos. WEST 2006-548-M and WEST 2006-549-M

On August 17, 2004, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued proposed penalty assessment A.C. No. 42-01975-34633 (WEST 2006-548-M)

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate Docket Nos. WEST 2006-548-M, WEST 2006-549-M, and WEST 2006-550-M, all captioned *Lake View Rock Products, Inc.*, and all involving similar procedural issues. 29 C.F.R. § 2700.12.

to Lake View, which was received on August 24, 2004, and became a final order on September 23, 2004.<sup>2</sup> Mot. Attach. A; S. Resp. Attach. A. In addition, MSHA issued proposed assessment A.C. No. 42-01975-39951 (WEST 2006-549-M) to Lake View on October 12, 2004, which was received on October 25, 2004, and became a final order on November 24, 2004. S. Resp. Attach. A. Lake View alleges that it failed to timely contest these two assessments due to “excusable neglect” resulting from a change in counsel within the same law firm. Mot. at 2, 4; Aff. Lake View also requests that the Commission reopen the penalty assessments so that it can seek to reach a settlement of the violations. Mot. at 4-6.

The Secretary states in her response that she opposes the Commission’s granting Lake View’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 assessments in Docket Nos. WEST 2006-548-M and WEST 2006-549-M became final Commission orders. S. Resp. at 1-2. The record reveals that Lake View did not file its request to reopen until more than one year and eleven months after a final Commission order in Docket No. WEST 2006-548-M and more than one year and nine months in Docket No. WEST 2006-549-M.

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.

We have been presented with Lake View’s failure to timely contest the proposed penalty assessments because of the neglect or inadvertence of its counsel. This is the type of error that falls squarely within the ambit of Rule 60(b)(1). However, under Rule 60(b), 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. Fed. R. Civ. P. 60(b).

Because Lake View waited well over a year to request relief with regard to these two proposed assessments, its motion is untimely. *JS Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, Lake View’s motion is denied as to Docket Nos. WEST 2006-548-M and WEST 2006-549-M.

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<sup>2</sup> Lake View had already contested the underlying citations in A.C. No. 42-01975-34633. That contest is the subject of Docket Nos. WEST 2004-387, WEST 2004-388, and WEST 2004-389 and is currently on stay before Commission Administrative Law Judge Jerold Feldman pending the assessment of penalties.

B. Docket No. WEST 2006-550-M

Lake View also requests the Commission to reopen another proposed assessment, A.C. No. 42-01975-72172 (WEST 2006-550-M), which was issued November 15, 2005, and became final on December 30, 2005. As in the previous two dockets, Lake View asserts that its failure to timely contest the proposed assessment resulted from circumstances relating to its change of counsel, and it requests reopening so that it can seek to reach a settlement. Mot. at 2-6. The Secretary has no objection to reopening this case because the request is within one year after the proposed assessment became a final order.

In the interests of justice, we remand Docket No. WEST 2006-550-M to the Chief Administrative Law Judge for a determination of whether good cause exists for Lake View's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Accordingly, we deny Lake View's request to reopen the penalty assessments in Docket Nos. 2006-548-M and WEST 2006-549-M, and those proceedings are hereby dismissed. We remand Docket No. WEST 2006-550-M for further proceedings as appropriate.

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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