

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 11-1431

LONE MOUNTAIN PROCESSING, INC.,

Petitioner,

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),

and

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR THE SECRETARY OF LABOR

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CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASE

(A) Parties and Amici. All parties, intervenors, and amici appearing before the Federal Mine Safety and Health Review Commission and in this Court are listed in the brief for Lone Mountain.

(B) Rulings Under Review. References to the rulings at issue appear in the brief for Lone Mountain.

(C) Related Cases. This case has not previously been before this Court or any other Court. Counsel are unaware of any related cases currently pending before this Court or any other Court.

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* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY OF ABBREVIATIONS AND ACRONYMS

Br.	Brief for Lone Mountain
Commission	Federal Mine Safety and Health Review Commission
FRCF	Federal Rules of Civil Procedure
J.A.	Joint Appendix
Lone Mountain	Lone Mountain Processing, Inc.
Mine Act or Act	Federal Mine Safety and Health Act of 1977
MSHA	Mine Safety and Health Administration
Order	October 11, 2011, Order of the Federal Mine Safety and Health Review Commission
Secretary	Secretary of Labor

STATEMENT OF JURISDICTION

The Federal Mine Safety and Health Review Commission ("Commission") has held that, pursuant to Section 105(a) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815(a), it is authorized under appropriate circumstances to apply the principles embodied in Rule 60(b) of the Federal Rules of Civil Procedure ("Rule 60(b)" of the "FRCP") to reopen final Commission orders that came into being by virtue of a mine operator's failure to timely contest a penalty assessment proposed by the Secretary of Labor ("Secretary"). Jim Walter Resources, Inc., 15 FMSHRC 782, 786-89 (1993). On October 11, 2011, the Commission issued an order unanimously denying consolidated motions filed by Lone Mountain Processing, Inc. ("Lone Mountain") to reopen three penalty assessments that had become final Commission orders after Lone Mountain failed to notify the Secretary that it wished to contest those penalty assessments within 30 days of receiving notice of their proposal. See 30 U.S.C. § 815(a). Under Section 106(a)(1) of the Act, 30 U.S.C. § 816(a)(1), that order was final agency action eligible for review by this Court. On November 7, 2011, Lone Mountain filed a timely petition for review with the Court.

STATEMENT OF THE ISSUES PRESENTED

1. Whether, assuming that the Commission was required to apply case law arising under Rule 60(b)(1) -- an assumption that underlies Lone Mountain's entire brief -- Lone Mountain was ineligible for reopening because it failed to assert a potentially meritorious defense.

2. Whether, even if Lone Mountain was eligible for reopening, the Commission properly denied reopening on the grounds (a) that Lone Mountain failed to adequately explain its failure to contest the proposed penalty assessments, (b) that Lone Mountain failed to explain the time it took to request reopening after it was informed of its penalty delinquencies in this case, and (c) that Lone Mountain failed to explain how its penalty delinquencies in other cases did not warrant a finding that it was acting in bad faith.

3. Whether Lone Mountain's contention that the Commission was required to consider whether Lone Mountain's claim that reopening would not prejudice the Secretary is not properly before the Court, and in any event is without merit.

PERTINENT STATUTES AND REGULATIONS

All applicable statutes and regulations are set forth in the Brief for Lone Mountain, with the exception of 29 C.F.R.

§§ 2700.25 and 2700.26 and 30 C.F.R. § 100.7(c), which are set forth in the addendum to this brief at A-1.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

The Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act") was enacted to improve and promote safety and health in the Nation's mines. 30 U.S.C. § 801. In enacting the Mine Act, Congress stated that "there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's * * * mines * * * in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines." 30 U.S.C. § 801(c). Titles II and III of the Act establish interim mandatory health and safety standards. In addition, Section 101(a) of the Act authorizes the Secretary to promulgate improved mandatory health and safety standards for the protection of life and prevention of injuries in coal and other mines. 30 U.S.C. § 811(a).

Under Section 103(a) of the Mine Act, inspectors from the Mine Safety and Health Administration ("MSHA"), acting on behalf of the Secretary, regularly inspect mines to ensure compliance with the Act and with standards. 30 U.S.C. § 813(a).

Section 104 of the Act provides for the issuance of citations and orders for violations of the Act or of standards. 30 U.S.C. § 814. Section 105 of the Act provides that the Secretary shall propose penalties for every citation or order she issues. 30 U.S.C. § 815. Under Section 105(d) of the Act, a mine operator may timely contest a citation, order, or proposed civil penalty before the Commission, an independent adjudicatory agency established under the Act to provide trial-type administrative hearings and appellate review in cases arising under the Act. 30 U.S.C. § 815(d). See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 204 (1994); Secretary of Labor v. National Cement Co. of California, Inc., 573 F.3d 788, 789 (D.C. Cir. 2009).

Section 105(a) of the Mine Act provides that if, within 30 days from the receipt of the notification of a proposed penalty assessment by the Secretary, the operator fails to notify the Secretary that it intends to contest the citation or the proposed assessment, the citation and the proposed assessment "shall be deemed a final order of the Commission and not subject to review by any court or agency." 30 U.S.C. § 815(d). See also 29 C.F.R. §§ 2700.25 and 2700.26; 30 C.F.R. § 100.7(c) (same).

The Mine Act does not provide for reopening penalty assessments that have become final Commission orders by operation of law under Section 105(a), and does not explicitly provide for the application of Rule 60(b) of the FRCP in determining whether a final Commission order should be reopened. The Commission, however, has held that it is authorized by Section 105(a) of the Act to apply under appropriate circumstances the principles embodied in Rule 60(b) to reopen penalty assessments that have become final Commission orders. Jim Walter Resources, Inc., 15 FMSHRC at 786-89.

B. Facts and Procedural History

On July 8, 2010, pursuant to 30 U.S.C. § 815(a) and 29 C.F.R. § 2700.20(b), Lone Mountain filed a notice of contest of 13 citations and orders issued to it by MSHA. See J.A. 1-31. On July 14, 2010, the Chief Administrative Law Judge of the Commission assigned Commission docket numbers to each contested citation and order and stayed the proceedings pending MSHA's issuance of proposed penalty assessments. J.A. 32-33.

On August 17, 2010, in Assessment Case No. 000228827, MSHA issued Lone Mountain proposed penalty assessments totaling \$21,840 relating to certain of the citations and orders the operator had contested on July 8. J.A. 34-36. That proposed assessment was delivered to Lone Mountain and signed for by

D. Atkins on August 24, 2010, and, when uncontested, became a final order of the Commission on September 23, 2010. As with all proposed penalties, the proposed assessment contained the statement:

[Y]ou have 30 days from receipt of this proposed assessment to either pay the penalty, or notify MSHA that you wish to contest the proposed assessment and that you request a hearing on the violations in question before the Federal Mine Safety and Health Review Commission. If you do not exercise the right herein described within 30 days of receipt of this proposed assessment, this proposed assessment will become a final order of the Commission and will be enforced under provisions of the Federal Mine Safety and Health Act of 1977.

J.A. 67. See also J.A. 80, 82, 86, 88 (same). MSHA mailed Lone Mountain a notice of delinquency on December 1, 2010. J.A. 66.

On January 11, 2011, in Assessment Case No. 000243808, MSHA issued Lone Mountain proposed penalty assessments totaling \$212,054 relating to certain of the citations and orders the operator had contested on July 8. J.A. 37-40. That proposed assessment was delivered to Lone Mountain at the address of record and signed for by D. Atkins on January 18, 2011, and, when uncontested, became a final Commission order on February

17, 2011.¹ MSHA mailed Lone Mountain a notice of delinquency on April 4, 2011. J.A. 79.

On June 6, 2011, Lone Mountain filed two motions to reopen -- one for Assessment Case No. 000228827 and one for Assessment Case No. 000243808 (J.A. 41-47, 48-55) -- each accompanied by an affidavit from Lone Mountain Safety Manager Wilburn Howard stating, in identical language, that during internal handling of the proposed assessments, "they were misplaced." J.A. 44, 51. On June 22, 2011, the Secretary filed oppositions to Lone Mountain's motions to reopen. J.A. 58-69, 70-85.

On July 15, 2011, in Assessment Case No. 000261203, MSHA issued Lone Mountain proposed penalty assessments totaling \$262,500 relating to certain of the citations and orders the operator had contested on July 8, 2010. J.A. 86-91. That proposed assessment was delivered to Lone Mountain at the address of record and signed for by S. Roddy on July 20, 2011,

¹ The stay of the citations and orders in the contest proceedings associated with Assessment Cases No. 000228827 and No. 000243808 was effectively extinguished, and the contest proceedings were dismissed by operation of law, when Lone Mountain failed to timely contest the proposed assessments. See 30 U.S.C. § 815(a) (making both the citation and the penalty assessment a final order of the Commission if the proposed penalty is not timely contested). See also Old Ben Coal Co., 7 FMSHRC 205, 207-10 (1985) (right to a hearing on a notice of contest is extinguished if contestant fails to contest MSHA's proposed penalty). Thus, Lone Mountain's assertion (Br. 6) that the contest cases are "still on stay" is incorrect.

and, when uncontested, became a final Commission order on August 19, 2011.

On September 16, 2011, Lone Mountain filed a third motion to reopen -- for Assessment Case No. 000261203 (J.A. 95-101) -- accompanied by an affidavit from Lone Mountain Safety Manager Howard stating that, during internal handling of the proposed assessments, "they were apparently misplaced or may have been sent to the wrong location." J.A. 95. The issues raised by the third motion to reopen were effectively identical to the issues raised by the first two.

C. The Order of the Commission

On October 11, 2011, the Commission issued an order (1) consolidating the three Lone Mountain motions to reopen, (2) noting its prior holding that, following the "guidance" of Rule 60(b), the Commission can reopen final penalty assessments in appropriate circumstances because of "mistake, inadvertence, or excusable neglect," and (3) unanimously holding that Lone Mountain failed to establish that it was entitled to the extraordinary remedy of reopening under the principles applicable under Rule 60(b). J.A. 103-07. The Commission stressed that its case law established that "an inadequate or unreliable internal processing system" -- the sole ground identified by Lone Mountain as constituting "excusable neglect"

here -- is not an adequate ground for reopening a final assessment. J.A. 105. Moreover, the Commission noted that "this type of failure appear[ed] to be part of a pattern for Lone Mountain, as demonstrated by the fact that the same error occurred three times in one year." Ibid. Furthermore, the Commission held that unexplained delays by Lone Mountain of six months and two months, respectively, after being notified of delinquency by MSHA before moving to reopen precluded reopening. Ibid. Finally, the Commission held that the existence of 18 delinquent penalty cases, which involved approximately \$550,000 (including the penalties in Assessment Case Nos. 000228827 and 000243808 at issue here) in unpaid penalties accumulated by Lone Mountain since January 2008 and which existed at the time of the Commission's order, demonstrated "bad faith" precluding reopening. J.A. 105-06.²

SUMMARY OF ARGUMENT

Underlying Lone Mountain's appeal is the assumption that Rule 60(b)(1) case law controls in reopening cases before the Commission. Assuming that that assumption is correct (it is not), Lone Mountain was ineligible for reopening in this case because it failed to assert a potentially meritorious defense on

² Subsequent to the issuance of the Commission's order, Lone Mountain paid MSHA a significant portion of the delinquent debt relied on by the Commission, exclusive of the penalties at issue in this case.

the merits of the penalty cases at issue. This Court has held that the assertion of a potentially meritorious defense is a precondition to reopening under Rule 60(b)(1).

Lone Mountain is also ineligible for reopening because it failed to adequately explain its failure to contest the Secretary's proposed assessments, instead relying on internal mishandling of proposed assessments, something the Commission and courts have recognized as legally insufficient to warrant the extraordinary remedy of reopening. Worse, Lone Mountain engaged in precisely the same conduct in relation to three proposed assessments in an eleven-month period. Worse still, Lone Mountain failed to explain why it took up to six months to request reopening after being notified of the fact that it had failed to timely contest the proposed assessments. Finally, Lone Mountain failed to explain why its request for reopening should not be construed as made in bad faith when it had an extensive record of unpaid civil penalties totaling over half-a-million dollars at the time it sought reopening by the Commission.

Lone Mountain's contention that the Commission abused its discretion in declining to reopen because it failed to consider Lone Mountain's claim that reopening would not prejudice the Secretary should be rejected. That issue was not adequately

raised before the Commission, and therefore should not be addressed on appeal, because it was not set forth with the requisite degree of specificity and supporting argument. In any event, the Commission was not required to consider whether the Secretary would be prejudiced by reopening under Rule 60(b)(1) case law because the Commission was not required to apply Rule 60(b)(1) to Commission proceedings. Instead, rather than considering, on a case-by-case basis, whether prejudice to the Secretary would result from reopening, the Commission should assume that any reopening results in prejudice to the Secretary in enforcing the Mine Act on a program-wide basis. In light of the overarching emphasis Congress placed on prompt and certain penalty collection, no finding of unlawfully disparate treatment of the Secretary and mine operators should arise from the fact that only the latter are required to demonstrate case-specific prejudice (in the context of late-filed penalty petitions by the Secretary). Finally, even if Rule 60(b)(1) case law applied to penalty assessment reopenings before the Commission, any error in the Commission's failure to consider possible prejudice to the Secretary would be harmless error. The absence of a factor that can only militate against reopening -- such as prejudice to the Secretary -- cannot substitute for the presence of a factor that militates in favor of reopening. Here, there are no

factors that militate in favor of reopening; therefore, there is no need to consider whether there is a factor that militates against reopening.

ARGUMENT

I.

APPLICABLE LEGAL PRINCIPLES AND STANDARD OF REVIEW

To establish "mistake, inadvertence, or excusable neglect" under Rule 60(b)(1) of the FRCP, a party must provide an explanation that constitutes adequate or good cause for its failure to take the required action. See Atlanta Sand & Supply Co., 30 FMSHRC 605, 606-08 (2008) (collecting cases); Highlands Mining & Processing Co., 24 FMSHRC 685, 686 (2002) (collecting cases). The burden is on the party requesting reopening, and to meet its burden, the party must establish more than mere carelessness. See Negron v. Celebrity Cruises, Inc., 316 F.3d 60, 62 (1st Cir. 2003); Pelican Production Corp. v. Marino, 893 F.2d 1143, 1146-47 (10th Cir. 1990); Dave Kohel Agency, Inc. v. Redshaw, Inc., 149 F.R.D. 171, 173 (E.D. Wis. 1993); Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 2858 n.18. Because reopening is an extraordinary remedy, the party requesting reopening must make a showing of exceptional circumstances. See Dave Kohel Agency, 149 F.R.D. at 173; In re

1115 Third Avenue Restaurant Corp., 185 B.R. 12, 14 (S.D. N.Y. 1995); Wright, Miller & Kane § 2858 n.18.

In addition, a party requesting reopening must identify facts that, if proven on reopening, would constitute a meritorious defense. See FG Hemisphere Associates, LLC v. Democratic Republic of Congo, 447 F.3d 835, 842 (D.C. Cir. 2006); New York v. Green, 420 F.3d 99, 109 (2d Cir. 2005); Resolution Trust Corp. v. Forest Grove, Inc., 33 F.3d 284, 288 (3d Cir. 1994), cert. denied, 513 U.S. 1121 (1995).

A party requesting reopening must also explain why, after it discovered the grounds it relies on for requesting reopening, it took the time it took to request reopening. See Cummings v. General Motors Corp., 365 F.3d 944, 954-55 (10th Cir. 2004) (collecting cases), abrogated on other grounds, 564 U.S. 394 (2006).

Finally, in reviewing a district court's decision whether to grant the extraordinary remedy of reopening, a reviewing court should apply a deferential abuse of discretion standard. United States v. 8 Gilcrease Lane, Quincy, Florida 32351, 638 F.3d 297, 300-01 (D.C. Cir. 2011).

The Mine Act does not make the FRCP or Rule 60(b) applicable to agency proceedings, and the FRCP themselves apply only to district courts, not to agencies. See Mister Discount

Stockbrokers, Inc. v. SEC, 768 F.2d 875, 878 (7th Cir. 1985) (citing Rule 1 of the FRCP).³ Although the Commission has stated that Commission proceedings "shall be guided as far as practicable" by the FRCP (Jim Walter Resources, Inc., 15 FMSHRC at 787 (quoting Commission Rule 1(b), 29 C.F.R. § 2700.1(b)), it has chosen to be guided by the FRCP voluntarily, and has not made the FRCP binding. When an agency chooses to apply principles embodied in the FRCP voluntarily, its application of principles it chooses to apply should be reviewed with "extreme deference" and will not be overturned "barring the most extraordinary circumstances." Hi-Tech Furnace Systems, Inc. v. FCC, 224 F.3d 781, 789 (D.C. Cir. 2000) (internal quotation marks and citation omitted) (applying discovery principles in agency proceeding). See also McClelland v. Andrus, 606 F.2d 1278, 1285, n.50 (D.C. Cir. 1979) (application of procedural rules adopted by an agency will be upheld unless there is an abuse of discretion).

³ In contrast, the Occupational Safety and Health Act (29 U.S.C. § 661(g)) explicitly makes the FRCP applicable to agency proceedings.

II.

ASSUMING THAT THE COMMISSION WAS REQUIRED TO APPLY CASE LAW ARISING UNDER RULE 60(b)(1) -- AN ASSUMPTION THAT UNDERLIES LONE MOUNTAIN'S ENTIRE BRIEF -- LONE MOUNTAIN WAS INELIGIBLE FOR REOPENING BECAUSE IT FAILED TO ASSERT A POTENTIALLY MERITORIOUS DEFENSE

As established above, the Commission was not required to apply case law arising under Rule 60(b)(1) in deciding this case. Assuming that the Commission was required to apply case law arising under Rule 60(b)(1) -- an assumption that underlies Lone Mountain's entire argument (see Br. at 12-18) -- the Court should rule that Lone Mountain was ineligible for reopening because it failed to assert a potentially meritorious defense.

This Court has held that assertion of a potentially meritorious defense is a prerequisite to reopening under Rule 60(b)(1). FG Hemisphere Associates, 447 F.3d at 842 (holding the rule of law that preceded the Supreme Court's decision in Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 393 (1993), survives post-Pioneer). That requirement "advances judicial economy" because it ensures that reopening "'will not be an empty exercise or a futile gesture.'" FG Hemisphere Associates, 447 F.3d at 842 (quoting Murray v. District of Columbia, 52 F.3d 353, 355-56 (D.C. Cir. 1995)). Before the Commission, Lone Mountain failed to assert a potentially meritorious defense. Accordingly, if it applies

case law arising under Rule 60(b)(1), the Court should rule that Lone Mountain was ineligible for reopening.⁴

III.

EVEN IF LONE MOUNTAIN WAS ELIGIBLE FOR REOPENING, THE COMMISSION PROPERLY DENIED REOPENING ON THE GROUNDS (A) THAT LONE MOUNTAIN FAILED TO ADEQUATELY EXPLAIN ITS FAILURE TO CONTEST THE PROPOSED PENALTY ASSESSMENTS, (B) THAT LONE MOUNTAIN FAILED TO EXPLAIN THE TIME IT TOOK TO REQUEST REOPENING AFTER IT WAS INFORMED OF ITS PENALTY DELINQUENCIES IN THIS CASE, AND (C) THAT LONE MOUNTAIN FAILED TO EXPLAIN HOW ITS PENALTY DELINQUENCIES IN OTHER CASES DID NOT WARRANT A FINDING THAT IT WAS ACTING IN BAD FAITH

A. Lone Mountain Failed to Adequately Explain Its Failure to Contest the Proposed Assessments

As set forth above, Lone Mountain's only explanation for missing the statutory 30-day deadline for contesting a proposed penalty assessment (30 U.S.C. § 815(a)) was that, upon receipt of each of the three proposed assessments, they were (or possibly were) internally "misplaced," i.e., mishandled by Lone Mountain employees. Br. 6, 7, 8. See J.A. 44, 51, 95. In denying Lone Mountain's motions to reopen, the Commission rejected Lone Mountain's explanation as insufficient to establish good cause. The Commission stressed that its case law

⁴ The Commission did not address Lone Mountain's failure to assert a potentially meritorious defense. The Secretary's argument that Lone Mountain was ineligible for reopening because of that failure, however, is properly before the Court because the Secretary raised it before the Commission and it supports the Commission's resolution of the case. See Warren v. District of Columbia, 353 F.3d 36, 38 (D.C. Cir. 2004).

established that "an inadequate or unreliable internal processing system" -- the sole ground offered by Lone Mountain to explain its missing of the filing deadlines here -- is not an adequate ground for reopening a final assessment. J.A. 105. See, e.g., Oak Grove Resources, LLC, 33 FMSHRC 103, 104 (February 2011); Pinnacle Mining Co., 30 FMSHRC 1061, 1062 (2008).

Using the same analysis, courts have repeatedly held that inadequate or unreliable internal procedures do not constitute an adequate excuse under Rule 60(b)(1). See Sloss Industries Corp. v. Eurisol, 488 F.3d 922, 935-36 (11th Cir. 2007) (collecting cases); Rogers v. Hartford Life and Accident Ins. Co., 167 F.3d 933, 939 (5th Cir. 1999); Lomas and Nettleton Co. v. Wisely, 884 F.2d 965, 967-68 (7th Cir. 1989). More specifically, courts have held that reopening is not warranted when a document is transmitted, but no attempt is then made to follow up and ensure that the document has been received and acted upon. Sloss Industries, 488 F.3d at 936; Gibbs v. Air Canada, 810 F.2d 1529, 1537 (11th Cir. 1987) ("Default that is caused by the movant's failure to establish minimum procedural safeguards for determining that action in response to a summons and complaint is being taken does not constitute default through excusable neglect"). The failure to follow up to ensure that

the documents were delivered and acted upon is underscored, not excused, in this case by the fact that the citations and penalties purportedly "were important to Lone Mountain as they relate[d] to eleven (11) notices of contest cases which involve a fatality." J.A. 44, 51 (Aff. at No. 4).

The Commission was particularly troubled by the fact that Lone Mountain failed to "follow up" on the second (January 11, 2011) and third (July 15, 2011) proposed penalty assessments after realizing "that an internal delivery problem existed" in relation to the first proposed assessment upon receiving the Secretary's December 1, 2010, delinquency letter. J.A. 37-40, 66, 86-91, 105.

The Commission also found that the type of failure exhibited by Lone Mountain here "appear[ed] to be part of a pattern for Lone Mountain, as demonstrated by the fact that the same error occurred three times in one year," i.e., in relation to proposed penalty assessments spanning the eleven-month period from August 17, 2010, to July 15, 2011. J.A. 105. See J.A. 34-36, 86-91. Because Lone Mountain has offered no reason why the sole explanation offered for its missing of the filing deadline on three occasions over the course of nearly a year was one the Commission was required to be find sufficient as a matter of law, the Commission's rejection of Lone Mountain's explanation

was a reasoned exercise of its discretion and should be affirmed.

B. Lone Mountain Failed to Explain the Time It Took to Request Reopening After It Was Informed of Its Penalty Delinquencies In This Case

In denying Lone Mountain's motions to reopen, the Commission also relied on the fact that the operator failed to address the Secretary's argument in her oppositions to the June 6, 2011, motions to reopen (J.A. 63, 75-76) that, having been notified by the Secretary that it was delinquent in regard to the first and second penalty assessments, Lone Mountain unexplainedly waited another six months and two months, respectively, before requesting reopening of those then-final assessments. J.A. 105. See J.A. 41-47, 48-55, 66, 79. Such unexplained delay is relevant to a determination regarding the "excusable neglect" claimed by Lone Mountain. See Highland Mining Co., 31 FMSHRC 1313, 1317 (Nov. 2009) (any delay of over 30 days must be explained). See also McLawhorn v. John W. Daniel & Co., Inc., 924 F.2d 535, 538 (4th Cir. 1991) (unexplained delay of three-and-a-half months was not a reasonable time); Security Mutual Casualty Co. v. Century

Casualty Co., 621 F.2d 1062, 1067-68 (10th Cir. 1980)

(unexplained delay of 115 days was not a reasonable time).⁵

C. Lone Mountain Failed to Explain How Its Penalty Delinquencies In Other Cases Did Not Warrant a Finding That It Was Acting In Bad Faith

Citing Pioneer Investment, 507 U.S. at 395, Lone Mountain stresses that the Supreme Court has stated that the determination of what constitutes "excusable neglect" "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." Br. 12 (emphasis supplied). In denying Lone Mountain's motions to reopen, the Commission, also citing Pioneer Investment, concluded that Lone Mountain's failure to address the Secretary's argument in her oppositions to the June 6, 2011, motions to reopen (J.A. 63-64, 76) -- that Lone Mountain's extensive record of delinquent (i.e., unpaid) final penalties from January 2008 through June 22, 2011 (totaling approximately \$550,000, including the penalties in Assessment Case Nos.

⁵ Although Lone Mountain correctly notes that it requested reopening of the third final assessment before receiving a delinquency notice from the Secretary (Br. 16), it fails to explain why it took more than a week (an acknowledged nine days) after "learning of its mistake" to request reopening of that penalty (Br. 16). That unexplained delay, although not long if viewed in a vacuum, should be viewed in the context of the fact that Lone Mountain already knew of the explanation for the first two failures to file on time, and knew that it was obligated to request reopening without delay.

000228827 and 000243808 at issue here) -- demonstrated its bad faith in seeking equitable relief from the Commission.

J.A. 105-06. See J.A. 83-85.

This Court has recognized that whether the party requesting reopening has acted in good faith is an important factor in deciding whether to grant reopening. FG Hemisphere Associates, 447 F.3d at 838. Lone Mountain's delinquency record, which shows that it repeatedly disregarded final penalty assessments, indicates that it had not acted in good faith at the time it sought reopening. See Budanio v. Saipan Marine Tours, Inc., 22 Fed.Appx. 708, 712-13 (9th Cir. 2001) (unpub.) (upholding denial of Rule 60(b) relief where moving party's conduct indicated "deliberate strategy" of "willful disregard for the authority of the court"); Oak Grove Resources LLC, 33 FMSHRC 1130, 1132 (June 2011) (denying reopening where, inter alia, operator failed to address delinquency of \$758,361).

Lone Mountain makes no meaningful attempt to demonstrate that the Commission erred in analyzing the three factors discussed above. Instead, Lone Mountain effectively bases its appeal entirely on the contention that the Commission erred by failing to consider Lone Mountain's claim that reopening would not prejudice the Secretary. For the reasons discussed below, the Court should reject that contention.

IV.

LONE MOUNTAIN'S CONTENTION THAT THE COMMISSION WAS REQUIRED TO CONSIDER LONE MOUNTAIN'S CLAIM THAT REOPENING WOULD NOT PREJUDICE THE SECRETARY IS NOT PROPERLY BEFORE THE COURT, AND IN ANY EVENT IS WITHOUT MERIT

Lone Mountain contends that the Commission was required to consider its claim that reopening would not prejudice the Secretary under Rule 60(b)(1) for two reasons: (1) because failure to do so is inconsistent with case law arising under Rule 60(b)(1); and (2) because failure to do so constitutes disparate treatment of the Secretary and mine operators. Br. at 13-18 (relying on Pioneer Investment and FG Hemisphere). Lone Mountain's contention should be rejected for both procedural and substantive reasons.

A. Lone Mountain's Contention Was Not Urged Before the Commission, And Therefore Is Not Properly Before the Court

Section 106(a)(1) of the Mine Act (30 U.S.C. § 816(a)(1)) states that, unless the failure or neglect to urge an objection "shall be excused because of extraordinary circumstances," "[n]o objection that has not been urged before the Commission shall be considered by the court * * * ." To "urge" an objection before the Commission, a party must "articulate it clearly" in its filing with the Commission and "offer a modicum of developed argumentation in support of it." See P. Gioioso & Sons, Inc. v.

OSHRC, 115 F.3d 100, 106-07 (1st Cir. 1997) (evaluating a party's petition for discretionary review under the similarly-worded judicial review provision of the Occupational Safety and Health Act), quoted with approval in Frank Lill & Son, Inc. v. Secretary of Labor, 362 F.3d 840, 844 (D.C. Cir. 2004). If a party fails to urge an objection before the Commission, a court of appeals lacks jurisdiction to consider the objection. Frank Lill & Son, 362 F.3d at 844; Durez Div. of Occidental Chemical Corp. v. OSHA, 906 F.2d 1, 5 (D.C. Cir. 1990).

Before the Commission, Lone Mountain's position with respect to prejudice consisted in each instance of nothing more than a bare assertion that "no prejudice would result if the[] penalty proceedings were reopened," followed by an observation that the underlying citations had already been contested. J.A. 41, 48, 92. Lone Mountain failed to articulate and develop an argument that the Commission was required to consider the claim that the Secretary would not be prejudiced on the grounds that failure to do so would be inconsistent with Rule 60(b)(1) case law and would constitute disparate treatment. Because Lone Mountain failed to urge that argument before the Commission, and because Lone Mountain's failure is not excused by extraordinary circumstances, the argument cannot be considered by the Court. See Durez Div., 906 F.2d at 5 (employer failed to urge an

objection before the OSH Commission when it asserted as an issue that the OSHA health standard in question "exceeded [OSHA's] statutory authority" but failed to "discuss[] the issue," "cite any authority[,] or otherwise put the Commission on notice of the nature of or basis for its challenge").⁶

B. Lone Mountain's Contention Is Without Merit

In any event, the issue of whether the Secretary would be prejudiced by reopening in this case is non-dispositive for two reasons. First, because the Commission was not required to apply Rule 60(b)(1), it was not required to apply Rule 60(b)(1) case law dealing with the concept of prejudice. Second, even if the Commission were required to apply Rule 60(b)(1) case law and address the question of prejudice to the Secretary, its failure to do so under the circumstances of this case would, at worst, constitute harmless error.

⁶ The Commission traditionally has not addressed claims that the Secretary would not be prejudiced by reopening. On the other hand, the Commission has never indicated that it would reject an argument that it is required to consider such claims. If Lone Mountain believed that the Commission was legally required to consider such claims, it should have advanced an argument to that effect before the Commission. Lone Mountain's failure to do so cannot be excused on the ground that the Commission inevitably would have rejected such an argument. See W & M Properties of Connecticut, Inc. v. NLRB, 514 F.3d 1341, 1345-46 (D.C. Cir. 2008) (employer's failure to urge an objection before the Board could not be excused on the ground that doing so would have been an exercise in "patent futility" in light of the Board's previous rejection of identical arguments) (citing Georgia State Chapter Ass'n of Civilian Technicians v. FLRA, 184 F.3d 889, 892 (D.C. Cir. 1999)).

1. The Commission was not required to apply Rule 60(b)(1)

Lone Mountain's contention that the Commission was required to consider the claim that reopening would not prejudice the Secretary in the standard Rule 60(b)(1) sense -- i.e., would not prejudice the Secretary in litigating the citations and penalties in this case -- is without merit. As established above, the Commission was not required to apply case law arising under Rule 60(b)(1) in deciding this case. Accordingly, the Commission was not required to consider the claim in this case that reopening would not prejudice the Secretary in litigating this case.

Instead of considering such case-specific no-litigation-prejudice claims, the Secretary submits, it would be appropriate to assume that reopening would more broadly prejudice the Secretary in enforcing the Mine Act on a program-wide basis. In enacting the Mine Act, Congress emphasized that the prompt and effective assessment and collection of penalties is the paramount mechanism for enforcing the Mine Act. In Coal Employment Project v. Dole, 889 F.2d 1127 (D.C. Cir. 1989), this Court recognized that Congress intended the imposition of adequate civil penalties to be the fundamental mechanism for enforcing the Mine Act. Reviewing the legislative history of the Mine Act, the Court stated:

Congress maintained and upgraded the civil penalty scheme of the Federal Coal Mine Health and Safety Act of 1969 ("Coal Act") in order to "induce those officials responsible for the operation of a mine to comply with the Act and its standards." Indeed, the sponsor of the 1977 Mine Act singled out the civil penalty as "the mechanism for encouraging operator compliance with safety and health standards." * * *. The Supreme Court as well has recognized that "[t]he importance of [the civil penalty provision] in the enforcement of the [Coal] Act cannot be overstated" because monetary penalties provide a "deterrence" that necessarily infrequent inspections cannot generate.

Coal Employment Project, 889 F.2d at 1132-33 (internal citations omitted) (emphasis supplied). In enacting the Mine Act, Congress also indicated that it "firmly believe[d] that the civil penalty is one of the most effective mechanisms for insuring lasting and meaningful compliance with the law * * * [and] that to effectively induce compliance, the penalty must be paid by the operator in reasonably close time proximity to the occurrence of the underlying violation." S. Rep. No. 95-181, 95th Cong., 1st Sess. 15-16 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 ("Leg. Hist.") at 603-04 (1978). Accord id. at 43, Leg. Hist. at 631 ("To be effective and to induce compliance, civil penalties, once proposed, must be assessed and

collected with reasonable promptness and efficiency"). Indeed, one of Congress' major concerns was that, under the predecessor statute to the Mine Act, the procedures "encourage[d] operators who [were] not predisposed to voluntarily pay assessed penalties to pursue cases through the elaborate administrative procedure and then to seek redress in the Courts." Id. at 16, Leg. Hist. at 604.

In light of Congress' overarching concern with the prompt and effective assessment and collection of penalties, it would be appropriate to assume that reopening would prejudice the Secretary in enforcing the Mine Act on a program-wide basis instead of evaluating claims that reopening would not prejudice the Secretary in litigating particular cases.⁷ The focus should be not on prejudice to the Secretary's ability to effectively litigate the particular case, but on prejudice to the Secretary's ability to effectively enforce the Act -- and that prejudice should be viewed as a factor that militates against reopening in every case.

⁷ Even under Rule 60(b)(1) case law, a court may give weight to such program or policy considerations. See FG Hemisphere, 447 F.3d at 838-39 (the Pioneer Investment factors are not exclusive, and a court may give weight to the Nation's interest in protecting a foreign sovereign's interest in being able to assert its foreign status); Jenkins & Gilchrist v. Groia & Co., 542 F.3d 114, 119 (5th Cir. 2008), cert. denied, 129 S.Ct. 1585 (2009) (a court may consider whether the public interest is implicated).

There is also no merit to Lone Mountain's contention that failure to consider claims that reopening would not prejudice the Secretary constitutes impermissibly disparate treatment of the Secretary and mine operators. It is permissible to require operators in late-filed penalty petition cases to demonstrate prejudice (once the Secretary has demonstrated adequate cause for the late filing), and not to require the Secretary to demonstrate standard case-specific prejudice in reopening cases, because treating the different situations differently advances the same overarching Congressional objective -- effective enforcement of the Mine Act through the assessment and collection of penalties -- in both situations. See Mobile Relay Associates v. FCC, 457 F.3d 1, 10 n.11 (D.C. Cir. 2006) (an agency may treat different situations differently). In both situations, the public interest in enforcing the Act is properly treated as paramount.

2. Even under Rule 60(b)(1) case law, failure to consider the non-prejudice claim under the circumstances of this case was, at worst, harmless error

Finally, even assuming that the Commission was required to apply case law arising under Rule 60(b)(1) in deciding this case, the Commission's failure to consider the claim that reopening would not prejudice the Secretary was not reversible error. It is clear both from the case law and from logic that

the absence of prejudice to the non-moving party is not an affirmative factor, i.e., one that militates in favor of reopening. Rather, the risk of prejudice to the non-moving party is a countervailing factor, i.e., one that militates against reopening. See Pioneer Investment, 507 U.S. at 395; Williams v. Meyer, 346 F.3d 607, 613 (6th Cir. 2003). The absence of a factor that cuts against reopening can have no determinative effect on reopening if there are no factors that cut in favor of reopening. If there are no factors that affirmatively support reopening -- and there were none in this case -- there is no need to consider whether there is a factor, such as prejudice to the Secretary, which cuts against reopening. See Weiss v. St. Paul Fire & Marine Ins. Co., 283 F.3d 790, 794 (6th Cir.), cert. denied, 537 U.S. 883 (2002) (a party seeking relief "must demonstrate first and foremost that the default did not result from his culpable conduct"). Because there was no need in this case to consider the claim that the Secretary would not be prejudiced by reopening, the Commission's failure to do so was, at worst, harmless error. See Li Hua Yuan v. Attorney General of United States, 642 F.3d 420, 427 (3d Cir. 2011) (explaining that, under the "harmless error" analysis, remand is not required where there is no

realistic possibility that, absent the alleged errors, the agency would have reached a different result).

CONCLUSION

In sum, Lone Mountain (1) failed to timely contest three proposed penalty assessments on three occasions in a one-year period, (2) failed to offer any legally cognizable explanation for those failures, relying instead on repeated internal misplacement of documents, (3) failed to explain why it took up to six months to request reopening after being informed by the Secretary that it was delinquent in paying those final penalties, (4) failed to assert any potentially meritorious defense, and (5) failed to explain how it was acting in good faith in requesting that those final penalties be reopened when they constituted part of 18 delinquent penalty cases totaling over half a million dollars in unpaid penalties. If Lone Mountain could qualify for reopening merely upon a showing that such reopening would not prejudice the Secretary in a standard Rule 60(b)(1) case-specific litigation sense, operators would qualify for reopening in all but those exceptional cases in which reopening would prejudice the Secretary in such a standard sense -- a result that would undermine enforcement of the

statute.⁸ The Court should affirm the order of the Commission denying Lone Mountain's request for reopening.

Respectfully submitted,

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⁸ Other Commission reopening cases cited by Lone Mountain in support of its argument that this case warrants reopening (Br. 14-15) are inapposite. In each of those cases, unlike in this case, there was an affirmative basis for finding excusable neglect for the movant's failure to timely contest or an absence of the negative factors militating against reopening.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), (C), and D.C. Cir. Rules 28(c) and 32(a)(1), I certify that this Brief for the Secretary of Labor contains 6,622 words as determined by Word, the processing system used to prepare the brief.

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CERTIFICATE OF SERVICE

I certify that this Brief for the Secretary of Labor was served by sending a copy by electronic transmission and two copies by overnight delivery this 26th day of March, 2012, on:

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ADDENDUM

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29 C.F.R. § 2700.25 Proposed penalty assessment.

The Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of the violation alleged, the amount of the proposed penalty assessment, and that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty assessment.

29 C.F.R. § 2700.26 Notice of contest of proposed penalty assessment.

A person has 30 days after receipt of the proposed penalty assessment within which to notify the Secretary that he contests the proposed penalty assessment. A person who wishes to contest a proposed penalty assessment must provide such notification regardless of whether the person has previously contested the underlying citation or order pursuant to § 2700.20. The Secretary shall immediately transmit to the Commission any notice of contest of a proposed penalty assessment.

30 C.F.R. § 100.7 Notice of proposed penalty; notice of contest.

(c) If the proposed penalty is not paid or contested within 30 days of receipt, the proposed penalty becomes a final order of the Commission and is not subject to review by any court or agency.