SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 93-0785
L. R. WILLSON AND SONS, INC.,	:	
Respondent.	:	

DECISION

Before: WEISBERG, Chairman; ROGERS, Commissioner.

BY THE COMMISSION:

L. R. Willson and Sons, Inc. ("Willson") filed a motion with the Commission requesting that the Commission order the Secretary to cease collection efforts seeking the payment of a penalty in this case. Administrative Law Judge Michael Schoenfeld denied Willson's motion. For the reasons that follow, we affirm the judge's order.

BACKGROUND

On February 25, 1993, the Secretary cited Willson for two violations. Serious Citation 1, Item 1 ("the general duty clause item") alleged a violation of section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), for exposing employees to hazards of uncontrolled loads and swinging and/or falling steel. Serious Citation 1, Item 2 ("the tag line item") alleged a violation of 29 C.F.R. § 1926.751(d) for failing to use tag lines to control loads while hoisting during structural steel assembly. The Secretary proposed a penalty of $4000 for each citation item. Willson timely contested both citations.

Prior to the hearing, the Secretary withdrew the general duty clause citation, making Willson the prevailing party as to that citation item. As a result, Willson sought an award of attorney's fees under the Equal Access to Justice Act, 5 U.S.C. § 504 ("the EAJA"), for the cost of defending itself against the general duty clause citation. The judge denied the application for fees because he had not yet filed a decision on the tag line item. After the judge filed his decision affirming the tag line item and assessing a $4000 penalty, Willson petitioned for discretionary review of the judge's decision. In the petition, Willson renewed its application for fees. The petition for review was not granted, and the judge's decision on the tag line item became a final order on October 3, 1994.

On October 19, 1994, Willson once again filed with the judge its application for attorney's fees. Subsequently, on January 17, 1995, the Secretary and Willson filed a settlement agreement with the judge which stated that "[t]he Respondent filed a petition for attorney's fees under the Equal Access to Justice Act, which is currently pending before the Commission. The parties wish to settle all matters raised by the [p]etition . . . ." By the terms of the settlement agreement, Willson agreed to accept payment from the Secretary "in full settlement of its

petition, withdraw its petition for fees, and cease any further proceedings in connection with this matter." While the agreement does specifically refer to the withdrawn general duty clause citation item, it does not mention the tag line item. On February 27, 1995, Judge Schoenfeld's Order Approving Stipulated Settlement became final.

On August 31, 1995, the Secretary sent a collection letter to Willson requesting payment of the tag line penalty. This was followed by collection letters on January 31, 1996 and February 23, 1996. Willson responded to each letter by claiming that the settlement agreement discharged it from all penalty obligations arising from the citation. On March 18, 1996, the Secretary notified Willson that she was going to pursue collection through litigation. On August 8, 1997, the Secretary again notified Willson that payment was overdue. In response to this letter, on August 26, 1997 Willson submitted to the Commission's Executive Secretary a "Motion to Cease Collection Efforts" in which Willson "moves the Commission for an Order directing the Occupational Safety and Health Administration ("OSHA") to cease its collection efforts against Willson." The Secretary filed an opposition and motion to strike Willson's motion. The case was again assigned to Judge Schoenfeld, who on November 11, 1997 found that the Commission was without jurisdiction to consider the merits of Willson's motion and accordingly denied that motion.

DISCUSSION

The Secretary has been attempting to collect from Willson a penalty she believes she is owed based on the tag line violation. Willson denies that it owes the penalty, and asks us to stop the Secretary's collection effort. We must reject Willson's request. The Act contains no provision authorizing the Commission to order the injunctive relief Willson seeks. Rather, the Act provides for the recovery of penalties by the Secretary "in a civil action . . . brought in the United States district court."[1] Hence, the Commission is not the proper forum to consider either a suit to collect penalties or to hear an appeal regarding the collection of penalties. /Badger Underground Constr., Inc./, 17 BNA OSHC 1696, 1697, 1995-97 CCH OSHD ¶ 31,096, p.43,396 (No. 94-3251, 1996) (penalty collection is solely the function of the Secretary of Labor under the Act). If and when the Secretary brings suit in a district court for payment of the tag line penalty, Willson can then present the arguments it makes in its motion.

Even if we were to treat Willson's motion as a motion for relief from the final order that approved the settlement agreement under Fed. R. Civ. P. 60(b),[2] such motion would be time-barred. Willson is time-barred from raising "mistake, inadvertence, surprise, or excusable neglect" under 60(b)(1) because its motion was not made until approximately two and a half years after the settlement agreement became a final order, well outside the one year limitation for such motions, despite a number of attempts by the Secretary in the interim to collect the penalty. We also do not find "any other reason justifying relief" under Rule 60(b)(6), the only other clause of Rule 60(b) that could apply here.

We therefore deny Willson's Motion to Cease Collection Efforts.

/s/
Stuart E. Weisberg
Chairman

_____

/s/
Thomasina V. Rogers
Commissioner

Dated: January 25, 1999

---

[1] Section 17(l) of the Act provides as follows:

> Civil penalties owed under this Act shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office.

The action may be brought "within five years from the date when the claim first accrued." 28 U.S.C. § 2462.

[2] Rule 60(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

> *Rule 60. Relief From Judgment or Order*
>
> . . . .
>
> *(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or a party's legal representative 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 . . . 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. The 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.