

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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January 12, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2009-848-M
v.	:	A.C. No. 32-00793-188600
	:	
PINKY’S AGGREGATES, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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. (2006) (“Mine Act”). On September 22, 2009, the Commission received from Pinky’s Aggregates, Inc. (“PA”) a letter seeking to 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).

We have held, however, 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 under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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 also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

The operator states that it received Proposed Assessment No. 000188600 on June 25, 2009. PA submits that it failed to contest the proposed assessment in a timely manner because the assessment was “misplaced.” The operator contends that the proposed assessment involves serious citations and requests that this matter be reopened.

The Secretary of Labor does not oppose PA’s request to reopen the proposed assessment. However, she urges the operator to take all steps necessary to ensure that, in the future, any penalty assessments are contested in a timely manner.

Having reviewed PA's request to reopen and the Secretary's response, we conclude that the operator has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. The operator's statement that it failed to timely contest the proposed penalties because the proposed assessment was "misplaced" does not provide the Commission with an adequate basis to reopen without further elaboration. Accordingly, we hereby deny the request for relief without prejudice. *See FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007). The words "without prejudice" mean that PA may submit another request to reopen Assessment No. 000188600 so that it can contest the proposed penalties.<sup>1</sup>

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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<sup>1</sup> If PA submits another request to reopen, it must establish good cause for not contesting the citations and proposed penalties within 30 days from the date it received the proposed assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. PA should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented PA from responding within the time limits provided in the Mine Act, as part of its request to reopen. PA should also submit copies of supporting documents with its request to reopen.

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