

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

July 29, 2010

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

v.

PINKY’S AGGREGATES, INC.

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Docket No. CENT 2009-848-M
A.C. No. 32-00793-188600

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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). On January 12, 2010, the Commission denied the motion without prejudice. *Pinky’s Aggregates, Inc.*, 32 FMSHRC 1, 3 (Jan. 2010). On January 27, the Commission received a second request to reopen the penalty assessment.

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).

On June 18, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000188600 to PA, which listed proposed civil penalties for three citations. PA failed to contest the penalties as required by section 105(a) of the Mine Act. As a result, the proposed penalties were deemed final orders of the Commission.

On September 22, 2009, the operator filed a request to reopen the final orders with the Commission. The operator stated that it failed to contest the proposed assessment in a timely manner because the assessment was "misplaced." The operator attached to its request a delinquency notice from MSHA dated September 10, 2009, and copies of the citations. The Secretary did not oppose PA's request to reopen the proposed assessment.

On January 12, 2010, the Commission issued an order denying PA's request without prejudice because PA had not provided a sufficiently detailed explanation for its failure to time contest the proposed penalty assessment. 31 FMSHRC at 3. The Commission explained that the operator's statement that it failed to contest the proposed penalties because the proposed assessment was misplaced did not provide the Commission with an adequate basis to reopen without further elaboration. *Id.* It further stated that if PA submitted another request to reopen, it must establish good cause for not timely contesting the citations and proposed penalties and include a full description of the facts supporting its claim and submit any supporting documentation. *Id.* at 3 n.1.

On January 27, 2010, the operator resubmitted a copy of the September 10 delinquency notice that it had received from MSHA. The delinquency notice has hand-written notations apparently indicating that a petition to reopen had been filed with the Commission, but the notations do not provide any additional explanation for the operator's failure to timely contest the proposed assessment. A copy of an MSHA civil penalty collection report was attached which indicates that the penalties have not been paid.

In its January 27 submission, PA failed to set forth a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. PA has again failed to fully explain the circumstances involving its misplacement of the proposed penalty assessment, and how those circumstances prevented PA from timely contesting the proposed penalty. Accordingly, PA's request to reopen is denied. *See Left Fork Mining Co.*, 30 FMSHRC 8, 11 (Jan. 2009).

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

Distribution:

Jenny Letvin
Office Administrator
Pinky's Aggregates, Inc.
3731 86th Street, N. E.
Rollette, ND 58366

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021