

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

November 10, 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, Cohen, and Nakamura, Commissioners

ORDER

BY: Young, Cohen, and Nakamura, Commissioners

On September 22, 2009, the Commission received from Pinky’s Aggregates, Inc. (“PA”) a letter seeking to reopen Proposed Assessment No. 000188600, which proposed civil penalties for three citations in the sum of \$463. The proposed penalty assessment had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a), because the operator had failed to contest the proposed assessment within 30 days after receiving it. On January 12, 2010, the Commission denied the motion without prejudice on the basis that PA had not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalties. *Pinky’s Aggregates, Inc.*, 32 FMSHRC 1, 3 (Jan. 2010). On January 27, the Commission received a second request to reopen. On July 29, the Commission denied the request, with prejudice, on the basis that the operator had again failed to sufficiently explain its failure to file a timely contest. *Pinky’s Aggregates, Inc.*, 32 FMSHRC 790, 791-92 (July 2010).

We have discovered a letter from PA, dated January 25, 2010, explaining its failure to timely file a contest of the proposed penalty assessment, that was intended to be considered with the earlier, timely submission by PA, but was not. Upon consideration of the letter, we find good cause for reopening the proposed assessment.

In the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the

Secretary shall file a petition for assessment of penalty within 45 days of the date of this order.
See 29 C.F.R. § 2700.28.

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

Chairman Jordan and Commissioner Duffy, dissenting.

As the majority indicates, the Commission received a letter from Pinky's Aggregates, Inc. ("PA") dated January 25, 2010, explaining the untimely filing of the contest of the proposed penalty assessment. The Commission received the January 25 letter by facsimile on August 24, 2010. There are no notations on the letter explaining the discrepancy between the date of the letter and the date it was faxed to the Commission.

We would deem the letter received by the Commission on August 24 to constitute a petition requesting the Commission to reconsider its order of denial issued on July 29, 2010. Pursuant to Commission Procedural Rule 78(a), a petition for reconsideration must be filed within 10 days after a decision or order of the Commission has been issued. 29 C.F.R. § 2700.78(a). Accordingly, we would deny PA's petition for reconsideration as untimely.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

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