

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 20, 2009

SECRETARY OF LABOR,	:	Docket No. LAKE 2008-345-M
MINE SAFETY AND HEALTH	:	A.C. No. 47-02043-140232
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2008-346-M
	:	A.C. No. 47-02940-140235
v.	:	
	:	Docket No. LAKE 2008-347-M
	:	A.C. No. 47-03245-140241
	:	
PITLICK & WICK, INC.	:	Docket No. LAKE 2008-348-M
	:	A.C. No. 47-03367-140245

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 April 14, 2008, and November 21, 2008, the Commission received from Pitlick & Wick, Inc. (“Pitlick”) motions from counsel seeking to reopen four penalty assessments that had become final orders 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).

On November 7, 2008, the Commission denied without prejudice Pitlick’s request on the basis that the operator had failed to provide “a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments.” *Pitlick & Wick, Inc.*, 30 FMSHRC 1006, 1008 (Nov. 2008). On November 21, Pitlick promptly filed a second motion to reopen the penalty assessments with an affidavit that more fully explained the reason for its delay in contesting the assessments. The Secretary has not opposed the requests to reopen.

Having reviewed Pitlick’s request and the Secretary’s response, in the interest 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.

---

Mary Lu Jordan, Chairman

---

Michael F. Duffy, Commissioner

---

Michael G. Young, Commissioner

---

Robert F. Cohen, Jr., Commissioner

Distribution:

Adele L. Abrams, Esq.  
Law Office of Adele L. Abrams, P.C.  
4740 Corridor Place, Suite D  
Beltsville, MD 20705

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., 25<sup>th</sup> 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