

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 23, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2010-242-M
v.	:	A.C. No. 47-00865-196519
	:	
JOHN S. OLYNICK, INC.	:	

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 December 24, 2009, the Commission received from John S. Olynick, Inc. (“Olynick”) a motion made by counsel 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).

On September 9, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment No. 000196519 to Olynick. Olynick paid the penalty in a timely fashion. MSHA subsequently informed Olynick that it had initiated a special investigation against the owner of the company under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), based on allegations contained in the penalty assessment. Olynick seeks to reopen the penalty assessment and to consolidate it with any section 110(c) proceeding. It asserts that it was not aware that payment of the penalty could be construed as an admission of a violation and used as evidence against its agent in subsequent proceedings.

The Secretary opposes reopening and submits that under the doctrine of collateral estoppel, an operator's failure to contest a proposed penalty does not estop agents of the operator from litigating any aspect of the underlying violation. The Secretary states that she "traditionally has not argued that an operator's payment of or failure to contest a proposed assessment estops agents of the operator from litigating any aspect of the underlying violation in a subsequent section 110(c) proceeding, and the Secretary will not so argue if a subsequent section 110(c) proceeding is initiated here."

Based on the Secretary's representation that, if a section 110(c) proceeding is initiated, she will not argue that Olynick's payment of or failure to contest a proposed assessment estops the owner of the operator from litigating any aspect of the underlying violation, the grounds for the operator's contentions are unfounded. Accordingly, we hereby deny Olynick's request to reopen.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, 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., 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