

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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March 21, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2010-570-M
v.	:	A.C. No. 34-00353-198933
	:	
BONHAM CONCRETE, 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 March 29, 2010, the Commission received from Bonham Concrete, Inc. (“Bonham Concrete”) a request 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 30, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000198933 to Bonham Concrete, proposing civil penalties for 12 citations. In its letter seeking reopening, Bonham Concrete states that it did not request a hearing at the time it received the proposed assessment because it thought that the penalty was an "automatic fine" and "did not know [it] could ask for a reduction" of the penalty.

On April 7, 2010, the Commission received a response from the Secretary of Labor stating that she opposes the operator's request to reopen the assessment. The Secretary states that ignorance of the law and inability to pay are not permissible grounds for reopening. She notes that the proposed assessment itself, the Commission's procedural rules and MSHA's rules make it clear that the operator has 30 days to file a contest. She also notes that the operator has been in business since 1974, has successfully contested proposed assessments in the past, and has two pending Commission proceedings, Docket Nos. CENT 2008-550 and 551-M.

Having reviewed Bonham Concrete'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. Bonham Concrete's statement that it did not know it could ask for a reduction in the penalty does not provide the Commission with an adequate basis to reopen. Specifically, Bonham has failed to explain why it failed to file a contest of the proposed assessment at issue in this proceeding, when it previously has successfully contested proposed assessments in Docket Nos. CENT 2008-550 and 551-M. Furthermore, Bonham Concrete has failed to explain why it delayed approximately three months in responding to the delinquency notice sent by MSHA.<sup>1</sup> Accordingly, we hereby deny without prejudice Bonham Concrete's request. *See Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009); *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008).

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<sup>1</sup> In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 10-11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion).

The words “without prejudice” mean Bonham Concrete may submit another request to reopen this case so that it can contest the penalty assessment.<sup>2</sup> Any such request must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

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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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Patrick K. Nakamura, Commissioner

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<sup>2</sup> If Bonham Concrete submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the 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. Bonham Concrete should include a full description of the facts supporting its claim of “good cause,” including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. Bonham Concrete should also submit copies of supporting documents with its request to reopen and specify which proposed penalties it is contesting. Bonham Concrete should further explain in similar detail why it delayed in responding to MSHA’s delinquency notice.

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