

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 8, 2011

SECRETARY OF LABOR,	:	Docket No. LAKE 2010-903-M
MINE SAFETY AND HEALTH	:	A.C. No. 20-02909-208139
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2010-904-M
v.	:	A.C. No. 20-02909-211111
	:	
BYHOLT, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On August 17, 2010, the Commission received motions by counsel from Byholt, Inc. (“Byholt”) requesting to reopen 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).¹

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.

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers LAKE 2010-903-M and LAKE 2010-904-M, both captioned *Byholt, Inc.*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

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 January 7, 2010, and February 11, 2010, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000208139 and Proposed Assessment No. 000211111, respectively, to Byholt. On March 31, 2010, MSHA issued a notice to Byholt indicating that Assessment No. 000208139 had become final and now was delinquent. On May 6, 2010, MSHA issued another notice to Byholt indicating that Assessment No. 000211111 was delinquent.

In its motion to reopen, the President of Byholt explains that it did not file timely contests because it had no experience contesting violations previously. Byholt asserts that by the time it sought experienced counsel, the time for contest had passed. The President further states with respect to Assessment No. 000208139 that the operator was under the “mistaken[] belief that all of the [section] 104(d) citations/orders needed to be contested together and in waiting for the other three citations to be assessed, we missed the deadline.” Byholt Aff.

The Secretary opposes reopening, contending that the operator’s professed misunderstanding of MSHA’s contest procedures is particularly inexcusable because the instructions outlining how to contest are contained on the proposed assessment itself. She also submits that ignorance of the rules and the law is not a permissible ground for reopening under Rule 60(b)(1). The Secretary also contends that Byholt failed to explain why it waited over four months in Assessment No. 000208139 (Docket No. LAKE 2010- 903-M) and three months in Assessment No. 000211111 (Docket No. LAKE 2010-904-M) to bring motions to reopen after it had received delinquency notices. The Secretary also provides that because the operator had not responded to the delinquency notices, both matters were referred to the U.S. Department of Treasury for collection.

Having reviewed Byholt’s requests to reopen and the Secretary’s responses thereto, we determine that the operator has failed to provide a sufficient basis for the Commission to reopen the penalty assessment. The operator’s contention that it lacked experience to timely contest the proposed assessments lacks sufficient detail and does not provide adequate grounds for reopening. Significantly, Byholt has also failed to explain why it delayed approximately three and four months in responding to the delinquency notices sent by MSHA. *Pinnacle Mining Co.*, 30 FMSHRC 1071, 1073-74 (Dec. 2008).²

² 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).

Accordingly, we hereby deny without prejudice Byholt's request to reopen. *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that Byholt may submit another request to reopen the Assessment Nos. 000208139 and 000211111.³ Any amended or renewed request by the operator to reopen these assessments must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

³ If Byholt 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. Byholt should include a full description of the facts supporting its claim that its mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. Byholt should also submit copies of supporting documents with its request to reopen. Byholt should further explain and document in similar detail why it delayed in responding to MSHA's delinquency notice. The Commission would specifically expect Byholt to provide verified and detailed affidavits and documentation substantiating what it did after receiving the notices of contest and the notices of delinquency and why it delayed in seeking reopening.

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