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September 21, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	DISCRIMINATION PROCEEDING Docket No. PENN 2023-0049 MSHA No. PITT-CD-2023-01
and JAMES LOUIS GROVES, Complainant, v. CONSOL PENNSYLVANIA COAL COMPANY, LLC, Respondent	 Mine ID: 36-07230 Mine: Bailey Mine

ORDER ON SECRETARY'S MOTION FOR DEFAULT

Before: Administrative Law Judge William B. Moran

The Secretary of Labor has filed a Motion for Default Judgment. In the Motion, filed on April 10, 2023, and served solely via electronic mail on Attorney Albert S. Lee, the Secretary, through Attorney Alexandra Gilewicz, has moved

> for an order to show cause and default judgment because Consol *decided*[1] not to answer this whistleblower complaint. The Secretary filed her complaint in this matter on behalf of Complainant on February 27, 2023. The Commission confirmed receipt of the complaint that same day. Consol was notified that its answer must be filed within 30 days, by March 29, 2023. Consol has yet to file an answer, and any answer filed at this time will be untimely. The Secretary requests the Commission to issue a show cause order. If Consol's response to the show cause order is insufficient, the Secretary requests that the Commission grant this motion for default judgment and order all the relief requested in the complaint. (emphasis added).

[1] To be clear, as explained *infra*, the Court does not subscribe to the Secretary's assertion that Consol *decided* not to answer the Complaint.

Motion at 1.

According to the Commission's electronic case management system ("eCMS"), Attorney Albert S. Lee, with Tucker Arensberg, P.C., who was initially Counsel for the Respondent, was sent notice of this proceeding on February 27, 2023, at the same email address listed in the distribution, below. The notice was sent solely via electronic mail. That filing informed that an Answer was required to be filed within 30 days after service of the Complaint to the operator. *Id*.

Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires, in relevant part, that "[w]hen a party fails to comply with . . . these rules . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal." Accordingly, on August 16, 2023, the Court issued an Order to Show Cause in which the Respondent was ordered to respond on or before August 23, 2023, setting forth why it should not be held in default.

However, there had been a significant development subsequent to the Secretary's Motion for Default Judgment. The initial attorney, Mr. Lee, was replaced by new legal counsel, Attorney Christopher D. Pence. Attorney Pence filed a notice of appearance in this matter on August 14, 2023. Attorney Lee is no longer counsel for the Respondent in this matter. Attorney Pence and his law firm are not associated with Attorney Lee or his law firm. Thereafter, the Commission's eCMS record reflects that Attorney Pence filed an Answer on August 23, 2023.

The Respondent also answered the Court's show cause order on August 23, 2023, setting forth that it should not be held in default as the mine's former attorney, Mr. Lee, stated that he never received the complaint. Mr. Lee filed an affidavit, affirming that the complaint was never received.

> Mr. Lee is adamant that he did not receive the Discrimination Complaint, Motion for Default Judgment and email from the Solicitor's Office to the Court in his inbox. No one disputes the Solicitor's Office hit 'send' on the email, but for reasons unknown to Mr. Lee and CONSOL PA those documents were never delivered to Mr. Lee's inbox. Mr. Lee has searched his inbox and his spam filter to no avail. Mr. Lee's Firm has a particularly robust computer and email security system in place because of their work in banking matters. There have been previous occasions where email has been stuck in filters but they have always been located. This situation is unique in that the emails from the Solicitor's office have not been located. Mr. Lee unequivocally stated that he did not ignore multiple emails from the Solicitor's Office.

Respondent's Response to Order to Show Cause at 3.

The Court is guided by the Commission's observation "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 will be permitted. *See Coal Prep. Servs., Inc*., 17 FMSHRC 1529, 1530 (Sept. 1995)." *See, for example, Benton County Stone*, 2023 WL 4404507, (June 2023).

Commission case law holds that there is an exception to the requirement for timely filing of pleadings, where adequate cause has been shown for the belated filing, and there is no evidence to suggest that bad faith was present in causing the delay, and where there is no prejudice present as a result of the delay. *See Kaiser Aluminum and Chemical Corporation v. Secretary of Labor*, 3 FMSHRC 2296, 2297 (Oct. 1981) (denying a motion for default where the Secretary claimed that due to issues in their office procedures, they did not receive the actual notice on their desk). *See also Secretary of Labor v. Valley Camp Coal Company*, 1 FMSHRC 791 (Jul. 1979) (holding that the mistake or neglect of an attorney and the breakdown of internal office procedures were found to be adequate cause to justify late filing).

In this instance, the points made in Respondent's Sur-Reply are well-taken, incorporated by reference, and the text of the Sur-response has been included in the Appendix to this decision as a useful exposition on motions for default. Consistent with that determination, there is simply no legitimate basis for the Court to conclude that Attorney Lee has been untruthful in his representations to the Court. Even if the Court were suspicious of the attorney's representations, which it is *not*, suspicions are insufficient to conclude that the attorney was being disingenuous. Further, the Secretary has not suffered prejudice by the delay. It is noted that this case has been set for a hearing commencing on Wednesday, November 14, 2023, less than eight weeks from now.

Accordingly, it would be fundamentally unfair and unduly harsh to deny the Respondent the opportunity to defend under these circumstances. This is in large part because there is no evidence to suggest that the Respondent's initial attorney, Mr. Lee, ignored the various emails regarding the initial complaint and motion for default or is being dishonest regarding his affidavit.

The Court has considered each party's arguments and for the foregoing reasons, the Secretary's Motion is **DENIED** and the Court orders that CONSOL PA's Answer to Discrimination Complaint be accepted.

William B. Moran

William B. Moran
Administrative Law Judge

APPENDIX

RESPONDENT CONSOL PENNSYLVANIA COAL COMPANY, LLC'S SUR-RESPONSE TO REPLY TO RESPONSE TO ORDER TO SHOW CAUSE AND MOTION FOR DEFAULT JUDGMENT

Pending before the Court is the Secretary's Motion for Default Judgment which seeks an Order to Show Cause as to why CONSOL Pennsylvania Coal Company, LLC ("CONSOL PA") should not be held in default for failing to timely respond to the Secretary's Discrimination Complaint filed pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"). The Secretary's Motion was filed April 10, 2023. The Court issued the requested Order to Show on August 16, 2023 and directed CONSOL PA to show cause as to why it should not be held in default. CONSOL PA filed its response to the Motion for Default and the Order to Show Cause. On August 23, 2023. The Secretary filed a Reply to this Response on August 30, 2023 and continues to insist that the Court order CONSOL PA is in default and prevent it from defending this case on the merits. However, the arguments advanced in the Secretary's Reply simply do not overcome the Commission's strong preference that cases be decided on their merits.

I. **CONSOL PA Was Not Properly Served** In its initial Response, CONSOL PA fully set forth the law which governs whether emailing the Complaint to Mr. Lee constituted adequate service. In Reply, without citing any cases, the Secretary disputes CONSOL PA's interpretation of Rule 7 of the Commission's Procedural Rules and argues that Mr. Lee was the agent in fact authorized to accept service of the Complaint. CONSOL PA believes the law is clear and that service on a party is only perfected by emailing an attorney when that attorney is specifically authorized to accept service for the party. Attached as Exhibit 1 is a second affidavit from Mr. Lee affirmatively stating that he was not authorized to accept service of the Complaint on behalf of CONSOL PA and his representation was limited to the investigation. Moreover, there is no indication he "entered an appearance on behalf of such party [CONSOL] pursuant to Rule §2700.3(c)", as required by Rule §2700.7(d), which entry of appearance requires that: documents that may serve as an entry of appearance shall be only those filed with the Commission or Commission judge in a proceeding under the Mine Act or the Commission's procedural rules, rather than documents filed with MSHA. 64 FR 48707, 48709 (emphasis added). The Secretary seizes on Mr. Lee's statement to MSHA's special investigator that he represented CONSOL PA "in connection with" Mr. Groves' complaint. This statement was made on November 1, 2022, at the beginning of MSHA's investigation. As no Complaint with the Commission had been filed, this was not an "appearance" as contemplated by Commission Procedural Rules 7(d) and 3(c), 29 C.F.R. §2700.7(d) and §2700.3(c), or an agreement accept service for any future complaint. Mr. Lee's second affidavit is clear on this point. Of course, had Mr. Lee received the email, he could have accepted service on behalf of CONSOL PA (with its permission). But in this case he did not and, without a specific acceptance, the Secretary was bound to follow the applicable

Rules to ensure proper service. CONSOL PA believes the analysis it provided in its original Response clearly demonstrates that service of the Complaint was improper. CONSOL PA urges the Court to adopt that analysis and find that the Complaint was not properly served in February. CONSOL PA's Answer filed on August 23, 2023 should be accepted as timely.

II. Mr. Lee Did Not Lie to the Court

During the Secretary's investigation of Mr. Groves' Complaint, CONSOL PA was represented by Attorney Albert Lee. Mr. Lee participated in a conference call with the Court on August 24, 2023 and explained his efforts to search for previous emails from the Solicitor's Office forwarding the Complaint and Motion for Default Judgment when the Complaint was not answered in what the Secretary contends was the responsive pleading deadline. Mr. Lee explained his efforts to locate the Complaint and the Motion. Although Mr. Lee has not discovered the technical reason the emails did not appear in his inbox, he offered an explanation as to how that could occur. Mr. Lee later affirmed the veracity of the statements he made to the Court. Mr. Lee has stated to the Court, both in an email and verbally, and affirmed by affidavit, that the first notice he received that a Complaint was filed was the July 25, 2023 email from Judge Moran. The Secretary has characterized Mr. Lee's affirmed statements to the Court as "inherently incredible" (p.2 and 11), and that they "strain credulity" (p. 11) and has characterized Mr. Lee's efforts to locate the missing email as "vague" (p.12). The essence of the Secretary's position is that Mr. Lee lied about receiving emails from the Solicitor's Office and made little effort to locate the emails when he discovered a Complaint was filed and allegedly emailed to him. CONSOL PA asserts that there is no basis for the Court to find Mr. Lee, an officer of the Court who has affirmed statements made to the Court, is a liar. While Mr. Lee cannot state with certainty why the emails did not appear in his inbox, there is no incentive for Mr. Lee to ignore the emails, fail to advise CONSOL PA of the Complaint and fail to ensure a timely response is filed. The only conclusion that should be reached is that Mr. Lee did not receive the emails related to this matter until he received the email from Judge Moran. The Secretary suggests that Mr. Lee should have discovered the "problem" with his Firm's email system between the filing of the Complaint and the email from Judge Moran. Inasmuch as the reason Mr. Lee did not receive the emails prior to Judge Moran's email is unknown, it cannot be stated with certainty that his Firm's email system is the problem. Neither the undersigned nor Mr. Lee are computer scientists or qualified to explain all the technical reasons multiple emails may not be delivered to an inbox. While it stands to reason that a spam or security filter may be to blame, there are certainly other possibilities, including an issue with the sender's email system. Notably, the Secretary has not produced any read receipts from the email forwarding the Complaint or any subsequent email.1 Mr. Lee's affirmed statement that he did not receive the Complaint or the subsequent emails should be sufficient. Mr. Lee is an attorney with decades of experience and practices at a well-respected Pittsburgh law firm. He serves on his Firm's board of directors and risk management committee and certainly understands the importance of deadlines in a litigation setting. Mr. Lee has produced yet another affidavit indicating

that he represented CONSOL PA in connection with the investigation and represents the company in other employment related matters. He has affirmed that simply would not ignore any CONSOL-related email and there is simply no reason to disbelieve him. N. 1: The emails referenced by the Secretary prior to the filing of the Complaint do contain read receipts but are not relevant to the analysis. At that time, no Complaint had been filed and no deadline established by any applicable Rule had passed.

III. There is no Prejudice

The Secretary strains to convince the Court that she has suffered prejudice as a result of the delay in this case. This assertion is unpersuasive. As pointed out in the Response, no representative of the Secretary telephoned Mr. Lee or anyone employed by CONSOL PA to ask about the status of the Complaint. According to the Secretary, the deadline to answer passed in late March and the Secretary filed the Motion in April. If delay was harmful to the Secretary, why did she engage in motion practice (which takes time) rather than telephoning Mr. Lee and inquiring about the status of the Complaint? After filing the Motion on April 10, 2023, why did she wait the remainder of April and all of May 2023 without inquiring or telephoning Mr. Lee? The obvious answer to this question is that, while the matter is no doubt consequential, it was not so urgent that traditional Commission litigation timelines were inadequate. That is, until the Secretary saw an opportunity to gain a litigation advantage by now arguing urgency. It is noteworthy that there are numerous reported decisions wherein the Secretary or a complaining miner failed to meet the timeliness requirements in filing a discrimination complaint or a complaint for compensation. Of course, the Secretary's position in those cases is the exact opposite of her litigating position in this case. For example, in permitting a late filing as advocated by the Secretary, the Commission stated: [T]he pertinent legislative history nevertheless indicates that these timeframes are not jurisdictional . . . 'The failure to meet any of them should not result in the dismissal of the discrimination proceedings; the complainant should not be prejudiced because of the failure of the Government to meets its time obligations.' Plainly, Congress clearly intended to protect innocent miners from losing their causes of actions of delay by the Secretary. (Internal citations omitted). *Secretary of Labor v. 4-A Coal Co., Inc*., 8 FMSHRC 905, 908 (June 1986). In order for an untimely complaint to be dismissed, "material delay" must result and the operator must demonstrate that a "serious" delay significantly impaired a "meaningful opportunity to defend." *Farmer v. Island Creek Coal Co*., 13 FMSHRC 1226, 1231 (May 1991), *quoting Secretary v. 4- A Coal Co., Inc*., 8 FMSHRC 905, 908 (June 1986). Impairment of a meaningful opportunity to defend includes "tangible evidence that has since disappeared, faded memories, or missing witnesses*." See Walter A. Schulte v. Lizza Industries, Inc*., 6 FMSHRC 8, 13 (1984). *See also David Hollis v. Consolidation Coal Co*., 6 FMSHRC 21, 23-25 (January 1984), aff'd. mem.,750 F.2d 1093 (D.C. Cir. 1984) (table). There is no indication of lost or missing witnesses here. The Secretary has a long, consistent history of opposing an operator's attempt to dismiss a discrimination complaint because the Secretary missed the filing deadline. When the Secretary is late in filing a complaint, justice requires that matter be decided on its merits and the complaining miner have his day in Court. When an operator allegedly misses a deadline

to respond, does the same notion of justice preclude a hearing on the merits and mandate default, even when an officer of the Court has sworn he did not receive the Complaint? Does justice require that the Court ignore the service requirements of the Rules and deem a Complaint properly served when the receiving lawyer was not authorized to accept service and has sworn he did not receive the Complaint? The inconsistency of the Secretary's litigating position in this case is, to borrow from the Secretary, obvious to the most casual observer.

Respondent's Sur-Reply at 1-6.

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