FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 9, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 2008-400 A.C. No. 44-06804-156224
v.	:	
KNOX CREEK COAL CORPORATION, Respondent	:	Mine: Tiller No. 1

DECISION GRANTING SUMMARY DISPOSITION FOR FAILURE TO FILE A TIMELY ANSWER AND RESPOND TO INITIAL ORDER TO SHOW CAUSE

Statement of the Proceedings

Before: Judge McCarthy

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against Respondent, Knox Creek Coal Corporation, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. (the "Act'). The October 29, 2008 Petition seeks civil penalty assessments in the amount of $25,996 for 11 alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The citations and proposed civil penalty assessments are as follows:

Citation No.	Date	30 C.F.R.	Section Assessments
7317861	4/15/08	75.370(a)(1)	$1,795.00
7317862	4/16/08	75.202(a)	$2,106.00
7317904	4/16/08	75.370(a)(1)	$3,689.00
6632093	4/21/08	75.400	$3,689.00
6632099	4/23/08	75.400	$ 745.00
6632100	4/23/08	75.202(a)	$1,412.00
6632101	4/23/08	75.362(b)	$2,473.00
6632102	4/23/08	75.400	$3,996.00
6632103	4/23/08	75.400	$ 745.00
6632105	4/23/08	75.400	$3,689.00
6632107	4/23/08	75.517	$1,657.00

I. Initial Order to Show Cause

On November 16, 2009, Chief Administrative Law Judge Robert J. Lesnick issued by certified mail an Order to Respondent to Show Cause why default judgment should not be entered for failure to file an Answer as required by Commission Procedural Rule 29, 29 C.F.R. §2700.29. Chief Judge Lesnick Ordered that an Answer to the Petition be filed within 30 days of said Order, or Respondent will be placed in default and ordered to pay the assessed penalties. The return receipt indicates that said Order was served on Respondent on November 19, 2009. Respondent failed to file its Answer, as ordered, or otherwise respond to the Order to Show Cause. No default Order, however, ever issued.

II. Petitioner's Motion for Summary Disposition

Nearly six months later, on May 17, 2010, the Petitioner filed a Motion for Summary Disposition of Proceedings pursuant to Commission Procedural Rule 66, 29 C.F.R. §2700.66 because Respondent had not filed an Answer to date and had not responded to the Order to Show Cause.

III. Respondent's Appearance, Untimely Answer and Opposition

On May 18, 2010, counsel for Respondent filed a Notice of Appearance. On May 20, 2010, Respondent, by and through counsel, filed its Answer, which admitted, *inter alia*, that Respondent received a proposed assessment from the Secretary for $25,996.00. On or about May 24, 2010, Respondent, by and through counsel, served its Memorandum in Opposition to Motion for Summary Disposition of Proceeding on the Secretary and Commission.

In its Memorandum in Opposition, Respondent argued that it has bona fide defenses to the underlying 11 citations and that summary disposition would be unfair. Respondent averred that the Petition and Order to Show Cause were served on Respondent. However, Respondent never assigned to outside counsel. Contrarily, the Secretary's Motion for Summary Proceedings was served and immediately assigned to outside counsel, who immediately filed Respondent's Answer. Respondent further averred that it has unspecified bona fide defenses that could result in vacation of the citation, or reduction in the gravity cited and penalty assessed. In such circumstances, Respondent argued that it would be unjust to impose the full remaining $25,996.00 assessment against it for apparent administrative oversight in failing to assign this matter to outside counsel, particularly since the Secretary has argued no prejudice from any delay in having to defend the citations against reasonable inquiry and cross-examination. On the contrary, Respondent argued that any delay would most likely prejudice Respondent since unspecified persons with relevant knowledge of the citations have left its employ. In sum, Respondent argued that it is ready to proceed with discovery and that this case should be decided on the merits, not inadvertent procedural missteps.

IV. Petitioner's Reply

Petitioner replied that the Respondent admitted its failure to respond to the Petition and Order to Show Cause and has simply stated that this case was not "assigned to outside counsel" until the Secretary filed the instant motion. Thus, Petitioner argued that but for the Secretary's motion, Respondent's inaction would have resulted in default judgment. The Petitioner then analyzed requests for relief from default orders under Commission precedent applying Fed. R. Civ. P. 60(b), which provides that to obtain relief from a final judgment, a party must establish (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) that the judgment is void; (5) that the judgement has satisfied, released, or discharged or should not have prospective application; or (6) any other reason justifying relief. In essence, the Secretary argued that a party requesting reopening from a final judgment or default order under Fed.R.Civ.P. 60(b)(1) must establish more than mere carelessness, i.e., that this case was "never assigned to outside counsel." Finally, the Secretary argued that Respondent must, but has failed to, identify facts that, if proven on reopening, would constitute a meritorious defense. Accordingly, the Secretary argued in its Reply that Respondent has failed to satisfy its burden of establishing an entitlement to extraordinary relief from final order and the Secretary's Motion for Summary Disposition should be granted.

V. My Additional Order to Show Cause

On July 13, 2010, I issued an Additional Order to Show Cause. The Order recognized that the Commission is in the process of issuing a Notice of Proposed Rulemaking for a new Commission default rule, which proposes a rule that includes relief not only from orders that have become final by operation of law under section 105(a) of the Act, but also from defaults resulting from a party's failure to file an answer to a petition for assessment of penalty. I informed the parties in my Additional Order to Show Cause that in an effort to provide as much guidance to the parties as possible, the Commission, in its proposed rule has set forth two principle factors that the Commission would consider in determining whether to reopen a final order of default, as well as other additional factors that it may also consider. I informed the parties that the first factor that the Commission would consider is the nature of the error or omission leading to the default (including whether the operator exercised due diligence in attempting to contest the proposed penalty, whether the untimeliness was within the reasonable control of the operator, and the effectiveness of the operator's internal contest procedures). I informed the parties that the second factor is the period of time between the operator's discovery of its default and the filing of the request to reopen with the Commission. I further informed the parties that additional factors that the Commission might consider include the operator's history of penalty delinquencies, the size of the operator, the operator's experience with Mine Act procedures, whether the operator was represented by counsel at the time of the default, the size of the proposed penalty, prejudice to the Secretary or any affected person, whether the motion is opposed, and any other relevant factor.

I specifically informed the parties that I would consider these factors in arriving at my disposition of this matter. I directed the Respondent, within 14 days from the date of my order, to address these factors and Show Cause Why Summary Disposition for Failure to File a Timely Answer and Response to Notice to Show Cause Should Not Be Granted in this matter. I directed Petitioner to respond, if appropriate, within 8 days after service of Respondent's showing. I informed the parties that no further papers would be permitted and I would then rule on whether the Petitioner's proposed civil penalty assessments should not be made the final order of the Commission, and whether the motion for default judgment should be granted or denied.

VI. Respondent's Response

On July 27, 2010, Respondent filed its Response to Additional Order to Show Cause and attached the affidavit of Safety Director Jack Snow, which states that he has personal knowledge of the internal administrative process employed by Respondent to respond to proposed penalty assessments. Mr. Snow avers that he reviewed the Proposed Assessment issued by the Office of Assessments for MSHA, which contains the 11 citations at issue; that Respondent clearly indicated on the Proposed Assessment that it intended to challenge these citations; that Respondent returned the contested citation form to the Civil Penalty Compliance Office; and that Respondent's internal assessment payment process was followed because a $21,263 payment was made on August 12, 2008 for the non-contested citations.

Affiant Snow avers that when the Secretary filed the instant Petition against Respondent [back on October 29, 2008], it would have been routinely handled by corporate in-house counsel or forwarded for assignment to outside counsel for handling of all subsequent aspects of the proceeding. Affiant Snow states that when Chief Judge Lesnick's Order to Show cause was sent to Respondent in mid-November 2009, it was forwarded to corporate headquarters for further disposition. Mr. Snow continued to assume that the matter was being handled by either in-house or outside counsel.

Affiant Snow further states that when the Secretary filed her May 17, 2010 Motion for Summary Disposition for failure to file an Answer, the content of said motion caused him to make inquiries and learn that outside counsel had not been engaged, as intended. That is, in the words of Respondent's counsel, "...given the now obvious nature of the apparent default, Mr. Snow made inquiries and learned that, through an inadvertent mistake, outside counsel had not been engaged, as intended." Mr. Snow immediately contacted outside counsel and had "those documents" forwarded to outside counsel for prompt engagement. Outside counsel then filed Respondent's May 20, 2010 Answer the same day that the Petition was received from the Solicitor's Office by email. Said Answer pleads seven defenses to the Petition's allegations. Further, affiant Snow states that Respondent has bona fide and legal defenses to the citations that should be considered on their merits, and Respondent never intended to waive those defenses. Finally, Mr. Snow avers that all Petitions now received are forwarded immediately to outside counsel for disposition, and counsel confirms that [t]his apparent breakdown in communication had lead Knox Creek to change its procedures relating to the handling of incoming petitions."

Based on this factual background established by affiant Snow, Respondent argues that Commission precedent permits reopening uncontested assessments that have become final under § 105(a) because of inadvertence and mistake, citing *Peabody Coal Co.*, 19 FMSHRC 1613 (Oct. 1997) which cites *Jim Walter Resources, Inc*., 15 FMSHRC 782, 786-89 (May 1993), and citing *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). Respondent emphasizes the Commission's observation in *Coal Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995) that default is a harsh remedy and if a defaulting party can make a showing of good cause for failure to timely respond, reopening for disposition on the merits is appropriate. Respondent notes that the Commission directed reopening where counsel had misplaced a proposed assessment in a file rather than return it. See *Pederson Brothers, Inc*., LAKE 2008-60-M (Apr. 4, 2008). Similarly, Respondent notes that mistake and inadvertence under Fed. R. Civ. P. 60(b)(1) were established when the late filing of a hearing request was due to a processing error by accounts payable personnel. See *Doe Run Co.*, 21 FMSHRC 1183, 1184-85 (Nov. 1999) (granting motion to reopen where mishandling of proposed assessments resulted in mistaken payment during absence of employee regularly responsible for such tasks); *Kaiser Cement Corp*., 23 FMSHRC 374, 375 (Apr. 2001) (granting motion to reopen where operator's inadvertent payment of the proposed assessment was due to internal processing error and operator attached affidavit supporting its allegations).

In sum, Respondent argues that Commission case law supports the proposition that cases should be decided on their merits where it can be shown that some inadvertent error has prevented a party from strictly complying with the rules of procedure. Respondent reiterates that it timely submitted the contested citation form, which clearly expressed its intent to contest the instant citations; that Respondent promptly paid the net balance of $21,263 owed for the uncontested citations; that in-house or outside counsel should have filed a [timely] Answer because Knox Creek was not routinely handling communications from the Solicitor or the Court, and that after forwarding this November 2009 Court's Order to Show Cause [to corporate headquarters], Respondent had no reason to believe that this matter was not being handled by counsel. Respondent emphatically contends that it did not realize that its case was in jeopardy until it received the Motion for Summary Proceeding for failure to file an answer, a document whose very title clearly telegraphed that the process of answering petitions had broken down. At that time, Respondent directly contacted outside counsel and cured the pending default by promptly filing an answer. Respondent argues that the Secretary cannot argue prejudice from the regrettable and inadvertent delay, that Respondent is far more likely prejudiced given employee turnover, and that Knox Creek should be permitted to defend on the merits.

Respondent did not address most of the additional factors in the Commission's proposed default rule, as enumerated in my Additional Order to Show Cause.[1]

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[1]Respondent was placed on notice that I intended to consider these factors in my decision and has not challenged the use of these factors. In addition, these factors are similar to those used by other courts in determining whether Fed. R. Civ. P. 60(b)(1) allows for relief. *See, e.g. Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1223 (9th Cir 2000); *Pioneer Inv. Services Co. v.*

VII. Petitioner's Reply

On August 3, 2010, Petitioner filed its Reply to Respondent's Response to Additional Order to Show Cause. In said Reply, Petitioner argues that Respondent still fails to show good cause for its late Answer and failed to adequately explain the facts it claims are related to the first factor listed in my Additional Order to Show Cause, i.e., the nature of the error or omission that led to the failure to file a timely answer. Petitioner argues that Respondent attempts to cast the in-house legal department of its parent company, Massey Energy, as an entirely separate and distinct entity over which Respondent has no control, even though Respondent admits that upon receiving the Secretary's motion, it independently contacted outside counsel. According to Petitioner, this action belies Respondent's assertion that it was unable to proceed on its own and rely entirely on the in-house legal department to respond, or refer the matter to outside counsel. Petitioner argues that Respondent's safety director admits receiving and reviewing Chief Judge Lesnick's Order to Show Cause, which he simply forwarded to the in-house legal department without any instruction or question. Petitioner emphasizes that the Order to Show Cause orders Respondent to file an answer within 30 days or show good cause for failure to do so, and plainly stated, in italicized text for emphasis, "you will then be placed in default and ordered to pay the amount of MSHA's penalty $47,259.00 immediately," and "preserve your right to [a] hearing, you must file an Answer." Respondent, however, made no special efforts to address this issue until the Motion for Summary Disposition was filed.

Petitioner argues that the second factor, i.e., the period of time between the operator's discovery of the default and its action to cure it, also weighs against proceeding now on the merits since the Order to Show Cause was issued a year after the Petition was filed, and the instant motion was not filed until six months later. Thus, 18 months expired before Respondent sought this proceeding on the merits.

Petitioner argues that the additional factors set forth by the Commission in its proposed new default rule likewise weighed against Respondent's argument. In this regard, Petitioner asserts that MSHA's Data Retrieval System, available on its public website, shows that as of July 29, 2010, Respondent had 89 violations with delinquent penalties, originally assessed at $204,230.00, but currently assessed at $123,715.00, of which Respondent has paid only $1,094.00.[2] Thus, despite the fact that these penalties were reduced by almost half through litigation or negotiation, Respondent has failed to timely remit $123,715.00 in penalties, according to the Petitioner. Furthermore, Petitioner argues that Respondent is a large mine

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Brunswick Associates, Ltd. Partnership, 507 U.S. 380, 395 (1993).

[2]MSHA's Data Retrieval System contains information on mine citations, orders, and safeguards and is available at MSHA's public website (http://www.msha.gov/drs/drshome.htm). On September 8, 2010, the website indicated that the Tiller No.1 mine had 68 outstanding delinquent penalties originally assessed at $159,906.00, but currently assessed at $87,246.00, of which Respondent has paid only $1,049.00.

producing between 700,000 and 1,000,000 tons of coal annually, and it is controlled by a large energy company that produces over 10,000,000 tons of coal annually. Finally, Petitioner argues that Respondent has extensive experience with Mine Act procedures and was represented by in-house counsel at the time of the default.

VIII. Legal Framework

A. Procedural Rules

The applicable Commission Rules in this case provide as follows:

29 C.F.R § 2700.27

> § 2700.27 Proposal for a penalty.
>
> (a) When to file. Within 45 days of receipt of a timely notice of contest of a notification of proposed assessment of penalty, the Secretary shall file a proposal for a penalty with the Commission.

29 C.F.R § 2700.29

> § 2700.29 Answer.
>
> A party against whom a penalty is sought *shall* file and serve an answer within 30 days after service of a copy of the proposal on the party. An answer shall include a short and plain statement of the reasons why each of the violations cited in the proposal is contested, including a statement as to whether a violation occurred and whether a hearing is requested. (Emphasis added).

29 C.F.R § 2700.63

> § 2700.63 Summary disposition of proceedings.
>
> (a) Generally. When a party fails to comply with an order of a judge or these rules, an order to show cause shall be directed to the party before the entry of any order of default or dismissal.
>
> (b) Penalty proceedings. When the judge finds the respondent in default in a civil penalty proceeding, the judge shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid.

B. Analogous Precedent

In this penalty proceeding, it is undisputed that the Respondent failed to file a timely Answer and failed to respond to the initial Order to Show Cause. However, a Commission Administrative Law Judge (ALJ) never issued an Order of Default. Accordingly, this is not a

case where Respondent is requesting relief from a default judgment or order, since one never issued. Rather, at this stage of the proceeding, the issue is whether default judgment should issue at this time for failure to timely file an Answer and answer the original Notice to Show Cause.

The facts establish that it was only after the Secretary's Motion for Summary Disposition that Respondent filed its belated Answer because the case was not assigned to outside counsel before then. In essence, therefore, the Petitioner seeks a default judgment on the ground that the Respondent failed to file a timely answer to the Petition and Notice to Show Cause.

I could find no Commission case law or rule governing this issue. Accordingly, I look to analogous case law and the Commission's new proposed default rule to decide this issue.

The concept of granting default judgment in the absence of good cause shown for failure to timely file an answer is consistent with well-established case law under the National Labor Relations Act (NLRA), which provides a model for certain provisions of the Mine Act. The National Labor Relations Board (Board) has consistently rejected counsel inattention as an excuse for the late filing of an answer. See, .e.g., *King Courier*, 344 NLRB 485 (2005) (default judgment granted in absence of good cause shown for late filed answer due to inadvertent inattention of counsel); *South Atlantic Trucking, Inc*., 327 NLRB 534, 534-35 (1999).[3]

King Courier is particularly instructive. In that case, the respondent failed to file a timely answer to the General Counsel's complaint under the National Labor Relations Act. The General Counsel filed a Motion for Default Judgment with the Board. The Board issued an Order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The respondent, unlike Knox Creek, actually filed a response to the Board's Notice to Show Cause and included an answer to the complaint. In its response to the Board's Notice to Show Cause the respondent argued that its failure to file a timely answer to the complaint was "the result of inadvertent inattention of counsel in light of the substantial factual issues need to be addressed in this case." The Board found that Respondent's explanation for its failure to file a timely answer did not constitute good cause, noting that "[i]nadvertent inattention of counsel is not sufficient to establish good cause, citing *Electra-Cal Contractors*, 339 NLRB 370, 370 (2003), and *Associated Interior Contractors*, 339 NLRB 18, 18 (2003). Further, the Board found

[3]I note that the Board's decision *Air Climate Systems, Inc*. 357 NLRB No. 75 (May 30, 2008)*Air Climate Systems, Inc*., 357 NLRB No. 75 (May 30, 2008) (default judgment granted in absence of good cause shown for answer filed one-day late due to inattention of counsel to ensure timely filing), was decided by a two-member panel consisting of then Chairman Schaumber and then Member Liebman. On June 17, 2010, a divided Supreme Court ruled that the two-member Board was not authorized to issue decisions, specifically holding that Section 3(b) of the Act requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board. See *New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010). Accordingly, I need not rely on that analogous authority here.

that respondent's claim that there were substantive and factual issues which needed to be addressed was also not sufficient to establish good cause, and refused to address respondent's assertion that it had a meritorious defense since good cause for the late filed answer was not otherwise demonstrated. See *Dong–A Daily North America*, 332 NLRB 15, 16 (2000), citing *Printing Methods, Inc*., 289 NLRB 1231, 1232 fn. 4 (1988). Accordingly, the Board granted the General Counsel's Motion for Default Judgment for failure to file a timely answer to the complaint, despite Respondent's answer to the Notice to Show Cause.

Similarly, in *South Atlantic Trucking, Inc*., the Board found that the respondent failed to establish good cause for the failure to file a timely answer and granted the Acting General Counsel's Motion for Default Summary Judgment, despite respondent's response to the Notice to Show Cause. The Board rejected respondent's arguments that it tried unsuccessfully to fax the answer late on the due date, that hard copies of the answer were misplaced and not mailed until a week later, that summary judgment was unfair since it had a defense on the merits, that counsel was not a regular practitioner, and that the Acting General Counsel was not prejudiced by the delay. The Board found that respondent's late fax transmission would not have been excused, even if facsimile filing of answers were allowed under the Board's rules, and the copies of the answer which were mailed were also untimely. The respondent's bare assertion that the copies were misplaced and not mailed for a week did not establish good cause for failing to file a timely answer. *Father & Sons Lumber*, 297 NLRB 437 (1989), enfd. 931 F.2d 1093 (6th Cir. 1991). The respondent received clear notice of its obligation to file a timely answer and its attorney's unfamiliarity with the Board's procedures did not constitute good cause for the late filing. *Duro Pleating*, 317 NLRB 614 (1995). Similarly, the Board rejected the respondent's argument that the government had not been prejudiced by the late-filed answer, concluding that it is not necessary to show prejudice to require compliance with the pleading rule. In sum, respondent's response to the Notice to Show Cause was inadequate because it did not sufficiently explain failure to file a timely answer or provide a cogent reason for further extending the answering period. Finally, the Board noted that respondent's attack on the factual allegations of the complaint, which would have been appropriate in a timely answer, simply came too late. According, in the absence of good cause shown for failure to file a timely answer, the motion for default summary judgment was granted.

C. Legal Analysis

In this case, Respondent both failed to file a timely answer and failed to respond to the Chief Judge Lesnick's Order to Show Cause why no answer was timely filed and why default should not be entered. Thus, contrary to Affiant Snow's suggestion otherwise, it was well before the Secretary filed her Motion for Summary Disposition that the Order to Show Cause "clearly telegraphed that the process of answering petitions had broken down." Respondent's safety director admits receiving that Order to Show Cause, which was simply forwarded to corporate headquarters with no follow-up or direction. Thus, the nature of the error or omission leading to the failure to timely file an answer was the cavalier assumption by Respondent that the Order was being handled by either in-house or outside counsel.

According to Respondent's own affidavit, when the Secretary filed the instant Petition against Respondent in October 2008, it would have been routinely handled by corporate in-house counsel or forwarded for assignment to outside counsel. Respondent is represented by both in-house and outside counsel, as well as a staff responsible for safety compliance issues. Respondent, however, failed to track the progress of this case or follow-up to ensure that the case was being handled, even after an Order to Show Cause was issued.

As explained above in an analogous context, the inadvertent inattention of counsel or corporate headquarters is not sufficient to establish good cause. Respondent failed to exercise due diligence in attempting to perfect its contest to the proposed penalty, cure its failure to timely file an answer, or respond to the initial Order to Show Cause. The untimeliness and apparent breakdown in communication was clearly within the reasonable control of the Respondent and resulted from the ineffectiveness of its internal procedures, as demonstrated by its decision to independently contact outside counsel in response to the Motion for Summary Disposition, and change its procedures relating to the handling of incoming petitions.

In the circumstances of this case, the period of time between when the Respondent discovered, or should have discovered, its failure to file an answer and its effort to cure, is not a mitigating factor. Concededly, Respondent acted quickly by filing an answer after receiving the Motion for Summary Disposition, but that action simply comes too late. As emphasized above, Respondent was on notice that it was in jeopardy of default when it received the Order to Show Cause on November 19, 2009. The Order to Show Cause was filed one year after the initial Petition. Respondent's Safety Director admits that he received and reviewed the Order. The Order plainly stated, in italicized text for emphasis, "*You will then be placed in default and ordered to pay the amount of MSHA's penalty $47,259.00 immediately*." The order also stated that "to preserve your right to [a] hearing, you must file an Answer." Thus, the Order to Show Cause was clear and unequivocal notice that the Respondent had not properly answered and was at risk of being placed in default. The Motion for Summary Disposition was not filed until six months after Respondent received the Order to Show Cause. Thus, Respondent had six months to act and failed to do so. In fact, there is no evidence to suggest that Respondent would have ever acted if not prompted by the Motion for Summary Disposition. Therefore, this factor weighs in favor of default judgment against Respondent.

Additional factors that the Secretary highlighted in her papers further weigh in favor of granting her Motion for Summary Disposition. Respondent, Knox Creek Coal Corporation, is a subsidiary of Massey Energy Company and operates the Tiller No. 1 underground coal mine located in Tazewell County, Virginia. Petitioner represents that Respondent has a history of penalty delinquencies and that as of July 29, 2010, MSHA's Data Retrieval System indicated that Respondent had about 89 violations with outstanding delinquent penalties amounting to approximately $123,715.00.[4] Respondent is a large mine, which at the time of the violations subject to this docket, was producing between 700,000 and 1,000,000 tons of coal annually.

[4]As noted above, on September 8, 2010, MSHA's Data Retrieval System indicated that the Tiller No. 1 mine had 68 outstanding delinquent penalties amounting to a total of $87,246.00.

Respondent is controlled by a large energy company (Massey Energy), which produces over 10,000,000 tons of coal annually. Finally, Respondent has extensive experience with Mine Act procedures and was represented by in-house counsel, if not outside counsel, at the time of the default. The size of the proposed civil penalty assessments at issue – $25,996 for 11 alleged violations of mandatory safety standards – is but one-fifth of apparent, delinquent penalties and pales in comparison to revenue generated from annual coal production. The Secretary strongly opposes Respondent's belated efforts to proceed on the merits. Finally, it is not necessary for the Secretary to show prejudice to require compliance with Commission Procedural Rule 29 and an Order to Show Cause, and even if it were, this factor is outweighed by the other factors explained herein.

In sum, I am mindful of the Commission's observation in *Coal Preparation Services, Inc*., 17 FMSHRC 1530, 1531 (Sept. 1995), relied on by Respondent, that default is a harsh remedy and that if a defaulting party can make a showing of adequate or good cause for the failure to timely respond, the failure may be excused and appropriate proceedings on the merits permitted. In this case, however, I have made a determination based on the totality of the facts and circumstances, following full briefing by the parties on Additional Order to Show Cause, that Respondent has not made a showing of adequate or good cause for the failure to timely file an Answer or respond to Chief Judge Lesnick's initial Order to Show Cause. I decline to reward behavior that has already caused unwarranted expense to the Commission and Secretary because of unexcused failure by a large, experienced and sophisticated operator, represented by counsel, to follow Commission Rule and Order of the Commission's Chief Judge.

ORDER

In light of the foregoing, Petitioner's Motion for Summary Disposition for Failure to File a Timely Answer is **GRANTED**, and it is **ORDERED** that the Respondent pay a penalty of $25,996.00 within 30 days of this order.

Thomas P. McCarthy
Administrative Law Judge

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