

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE  
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July 13, 2010

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

**ADDITIONAL ORDER TO SHOW CAUSE WHY MOTION FOR SUMMARY  
DISPOSITION FOR FAILURE TO FILE A TIMELY ANSWER AND RESPONSE TO  
NOTICE TO SHOW CAUSE SHOULD NOT BE GRANTED**

**Statement of the Proceedings**

This proceeding concerns proposals for assessment of civil penalties filed by the Petitioner against the Respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). 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:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R.</u>	<u>Section Assessments</u>
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

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.

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.

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 admits, 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 by telecopy and first-class mail.

In its Memorandum in Opposition, Respondent argues that it has bona fide defenses to the underlying 11 citations and that summary disposition would be unfair. Respondent avers that the Petition and Order to Show Cause were served on Respondent, but never assigned to outside counsel, and that the Secretary's Motion for Summary Proceedings was served and immediately assigned to outside counsel, who immediately filed Respondent's Answer. Respondent avers 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 argues that it would be unjust to impose the full \$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 argues that any delay would be most likely to prejudice Respondent since unspecified persons with relevant knowledge of the citations have left its employ. In sum, Respondent argues that it is ready to proceed with discovery and that this case should be decided on the merits, not inadvertent procedural missteps.

Petitioner replies that the Respondent has 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 argues that but for the Secretary's motion, Respondent's inaction would have resulted in default judgment. The Secretary then analyzes 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 argues 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 argues that Respondent must, but has failed to, identify facts that, if proven on reopening, would constitute a meritorious defense. Accordingly, the Secretary argues 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.

### **Discussion**

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 § 2700.28

§ 2700.28 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. (Italics 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.

In this penalty proceeding, it is undisputed that the Respondent failed to file a timely

Answer and failed to respond to the Show Cause Order. However, a Commission Administrative Law Judge (ALJ) never issued an order of default. That is, *to date*, there has been no finding by an Administrative Law Judge that Respondent was in default, and no entry of a summary order assessing the proposed penalties as final. On the other hand, 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. Cf. *Air Climate Systems, Inc.*, 357 NLRB No. 75 (May 30, 2008) (default judgment granted in absence of good cause shown for late filed answer).

Based on the facts outlined above, I am sympathetic to the Petitioner's plight and loathe to require the expenditure of time and money in litigating matters that appear ripe for summary disposition for failure to follow Commission rules and ALJ Orders, particularly during this time of growing backlog in Commission case processing. In my view, the days for two or three bites at the apple may well be over. In fact, I recognize that the Commission is in the process of issuing a Notice of Proposed Rulemaking for a new Commission default rule, which proposes a rule including 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. Nevertheless, I also recognize that default is a harsh remedy, and that if the defaulting party can make a showing of good cause for failure to timely respond, appropriate proceedings on the merits may be warranted.

Accordingly, out of an abundance of caution, I have decided to issue this additional Order to Show Cause Why Summary Disposition for Failure to File a Timely Answer and Response to Notice to Show Cause Should Not Be Granted. In an effort to provide as much guidance to the parties as possible, the Commission, in its proposed rule has set forth two principal 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. 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). 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. 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.

The parties are hereby placed on notice that I have decided to consider these factors in arriving at my disposition of this matter. Accordingly, within **14 days** from the date of this order, the Respondent is Ordered to address these factors and to 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. The Petitioner is directed to respond, if appropriate, within **8**

**days** after service of Respondent's showing. No further papers will be permitted. I will 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.

**SO ORDERED.**

Thomas P. McCarthy  
Administrative Law Judge

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