FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 16, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2023-0244
v.	:	A.C. No. 03-02065-581176
MIKE MORGAN INDUSTRIAL, LLC	:	

BEFORE: Jordan, Chair; Baker and Marvit, 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. (2018) ("Mine Act"). On February 21, 2024, the Commission received from Mike Morgan Industrial, LLC ("MMI") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On November 13, 2023, the Chief Administrative Law Judge issued an Order to Show Cause in response to MMI's perceived failure to answer the Secretary of Labor's Petition for Assessment of Civil Penalty dated September 12, 2023. By its terms, the Order to Show Cause was deemed a Default Order on December 14, 2023, when it appeared that the operator had not filed an answer within 30 days.

MMI asserts that it contacted the Mine Safety and Health Administration ("MSHA") on September 19 to discuss the Penalty Petition and received no response.[1] MMI subsequently conducted a "routine check" on MSHA's Mine Data Retrieval System and discovered that the proposed penalty had become final. Upon further investigation, the operator located the Default Order in a spam email folder.[2]

[1] Specifically, MMI states that it contacted MSHA on September 19, 2023 to discuss the "Commission order associated with [the penalty assessment]." As of that date, the Commission had not issued any orders in this matter. The only logical inference is that MMI is referring to the Secretary's Petition for Assessment of Civil Penalty issued one week previously.

[2] MMI states that the change in the status of the penalty assessment "occurred without any notification." MMI concedes it received an email copy of the Chief Judge's Order to Show Cause and Order of Default, which clearly explained that the penalty would become final if no response was received. MMI was notified that the assessment would become final on December

The Secretary opposes the request to reopen. She represents that full payment for the relevant penalties was received on March 13, 2024, and asserts that the motion should therefore be dismissed. She further claims that the operator has failed to establish good cause to reopen or adequately justify its failure to timely respond to either the Penalty Petition or Default Order.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a Judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *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"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have 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 will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

An operator seeking to reopen a final penalty bears the burden of showing that it is entitled to such relief, through a detailed explanation of its failure to answer the Secretary's petition or respond to the Chief Judge's Order to Show Cause. *See, e.g.*, *Buzzi Unicem USA*, 45 FMSHRC 1015, 1016 (Dec. 2023); *Essroc Cement Corp.*, 40 FMSHRC 1147, 1148-49 (Aug. 2018). However, we have held that explanations which reflect an inadequate internal processing system do not establish good cause to reopen a final penalty. *See, e.g.*, *Revelation Energy, LLC*, 40 FMSHRC 375, 376 (Mar. 2018); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011).

Here, MMI asserts that it initially failed to answer to the Secretary's petition because it had contacted MSHA and was awaiting a response. However, the petition clearly explains that an answer must be filed with the Commission within 30 days. It is an operator's responsibility to fully read any information provided by the Secretary in connection with a proposed penalty. *See Stone Zone*, 41 FMSHRC 272, 275 (June 2019).

MMI asserts that it subsequently failed to respond to the Show Cause Order because the order went to a spam folder, and was not discovered until a routine check of MSHA's Mine Data

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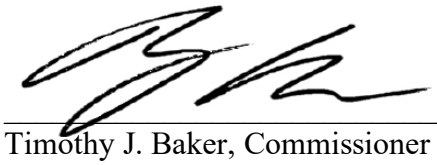
14, 2023. As explained below, the fact that the emailed Order was routed to a spam folder does not establish good cause for MMI's failure to respond. Arguably, MMI's statement could be interpreted as a claim of improper service. *See* 29 C.F.R. 2700.66(a). However, for the reasons below, we find any potential service issue insufficient to justify reopening in light of MMI's actual notification, failure to adequately explain its delay in moving to reopen, indications of an inadequate or unreliable system, and payment of the assessment.

Retrieval System. MMI does not explain how often these routine checks occur, or whether a separate mechanism is in place for routine checks of the spam folder. Failure to adequately monitor one's spam folder indicates an inadequate or unreliable internal processing system, and does not constitute good cause for a failure to timely respond. *See Trevino v. City of Fort Worth*, 944 F.3d 567, 571-72 (the fact that court communications were sent to a spam email folder "does not constitute excusable neglect under Rule 60(b)"); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156-57 (Sept. 2010) (finding an inadequate processing system where an operator overlooked certified mail as junk mail).

Additionally, an operator who files a motion to reopen more than 30 days after receiving notification of its failure to respond must also explain its delay in requesting relief. *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009). Here, MMI filed its motion more than three months after the Judge issued a Show Cause Order notifying the operator of its failure to respond to the Secretary's petition. MMI explains that it discovered the order in its spam folder some time later, after a routine check of the Mine Data Retrieval System. However, MMI does not state when that routine check occurred, how soon afterwards the order was discovered, or how soon after discovery the motion was filed. Accordingly, we cannot determine how long MMI waited to file its motion to reopen after learning of its failure to respond, or whether that delay was reasonable.

Having reviewed MMI's request and the Secretary's response, we conclude that the operator failed to establish good cause for reopening the captioned proceedings. Accordingly, MMI's request to reopen is denied.

Mary Lu Jordan, Chair



Timothy J. Baker, Commissioner

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