FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 20, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2022-0064
v.	:	A.C. No. 23-02434-546589
CONTINENTAL CEMENT COMPANY, LLC	:	

BEFORE: Jordan, Chair; Althen, Rajkovich, Baker, and Marvit, Commissioners

ORDER

BY: Jordan, Chair; Althen and Rajkovich, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On August 10, 2022, the Commission received from Continental Cement Company, LLC ("Continental") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On April 12, 2022, the Chief Administrative Law Judge issued an Order to Show Cause in response to Continental's perceived failure to answer the Secretary of Labor's February 10, 2022 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a default May 14, 2022, when it appeared that the operator had not filed an answer within 30 days.

Continental Cement states that it failed to timely file an answer to the Secretary's petition due to inadvertence. The operator explains that it filed a timely contest of penalties associated with twelve citations listed on a proposed penalty assessment (assessment control number 000546589). On February 10, 2022, the Department of Labor's Mine Safety and Health Administration ("MSHA") forwarded a petition for one of the citations and a second petition for the remaining eleven of the twelve citations. The operator's counsel attempted to forward the emails to an assistant to prepare answers. Although one email reached the assistant and one answer was timely filed, counsel inadvertently forwarded the second email only to himself, and the answer with respect to the eleven penalties was not filed. On April 12, 2022, Counsel received the April 12 order. However, Counsel inadvertently overlooked it because he was engaged in trial litigation at the time of receipt. The issue was further compounded by the fact that counsel's tracking of the assessment control number indicated an active docket. Counsel learned of the mistake upon receiving a July 28, 2022 delinquency letter from MSHA, and immediately prepared the subject motion to reopen. The Secretary does not oppose the request

to reopen, but notes that she may oppose future requests to reopen penalty assessments that are not answered in a timely manner.

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 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 will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Continental's request and the Secretary's response, we find that the operator's failure to properly file a response was the result of mistake.[1] We also note the operator's prompt filing of its motion to reopen upon learning of the issue. In the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chair

William I. Althen, Commissioner

Marco M. Rajkovich, Jr., Commissioner

[1] We caution the operator that future motions to reopen will not be granted where untimely filings are due to mistake or neglect that rise to the level of inadequate internal process or are otherwise not excusable.

Commissioner Baker and Commissioner Marvit, dissenting:

We would find that that Continental Cement Company, LLC ("Continental") failed to establish good cause to reopen in this case.

A party seeking the reopening of an assessment bears the burden of establishing that that the default was the result of more than mere carelessness. *Noranda Alumina, LLC*, 39 FMSHRC 441, 443 (Mar. 2017). The Commission has consistently held that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening an assessment. *See e.g. Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010).

Where a defaulting party was aware of or should have been aware of its responsibilities to the opposing party and to the court and has failed to live up to those responsibilities through unexcused carelessness or negligence, relief from default should not be granted. *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1206 (7th Cir. 1984); *see also Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990) (stating carelessness or negligence is not sufficient to warrant relief under Rule 60(b)(1)). Although a default judgment is a harsh sanction and the law favors trials on the merits, these considerations must be balanced against the need to promote efficient litigation and to protect the interests of all litigants. *C.K.S. Engineers*, 726 F.2d at 1206. Default judgment is only an effective deterrent against irresponsible conduct in litigation if relief from a default judgment under rule 60(b) is perceived as an exceptional remedy. *Id*.

In the instant case, Continental does not assert a mistake caused its failure to timely respond to the Secretary's assessment. Instead, it alleges an entire series of errors. Specifically, on February 10, 2022, Continental's counsel received two petitions from MSHA, but only successfully forwarded one of those petitions to an assistant for processing. On April 12, 2022, Continental received a Show Cause Order from the Commission, regarding its failure to timely respond to the February 10, 2022, assessment. That is, Continental was given a second chance to respond to the assessment before default. However, counsel for Continental was engaged in a trial and forgot he had received the Show Cause Order. Finally, counsel for Continental maintained an internal tracking system for assessments, but that system contained inaccurate information, showing that the docket was active.

Despite receiving two opportunities to respond to the Secretary's assessment, Continental failed to timely file an answer. This was the result of several breakdowns in its internal processing system. We do not believe that Continental has established that it is entitled to a third bite at the apple or the "extraordinary" relief of reopening. *See Lone Mountain Processing, Inc.*, 35 FMSHRC 3342 (Nov. 2013) (characterizing reopening as extraordinary relief).

In light of these circumstances we, respectfully, dissent.

Timothy J. Baker, Commissioner

Moshe Z. Marvit, Commissioner

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