FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2014-890
v.	:	A.C. No. 46-09062-348647
DYNAMIC ENERGY, INC.	:	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, 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. (2012) ("Mine Act"). On October 15, 2015, the Commission received from Dynamic Energy, Inc. ("Dynamic") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On October 16, 2014, the Chief Administrative Law Judge issued an Order to Show Cause in response to Dynamic's failure to answer the Secretary of Labor's June 18, 2014, Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on November 17, 2014, when it appeared that the operator had not filed an answer with the Judge within 30 days. The Judge's order here became a final order of the Commission on December 29, 2014. *See* 30 U.S.C. § 823(d); 29 C.F.R. § 2700.70(a).

On July 7, 2015, Dynamic received an email from the Commission's docket office asking whether it had submitted an answer to the Secretary's petition. On July 8, 2015, Dynamic filed its Answer to the Petition for Assessment. In that Answer, Dynamic did not refer to the Order to Show Cause but stated that it had never received a copy of the Petition for Assessment of Civil Penalty. On October 5, 2015, the docket office issued a Notice informing the operator that the proceeding was defaulted following its failure to respond to the Order to Show Cause.

In its motion to reopen, Dynamic alleges that it had good cause for its failure to file its Answer and its failure to respond to the Order to Show Cause. With respect to its failure to file an Answer, Dynamic asserts that when it received the Order to Show Cause, it searched its records and could not find a petition. Dynamic also asserts that upon receiving the Order to Show Cause it immediately drafted an Answer and sent it via certified mail. However, Dynamic's representative alleges that personal and computer "issues" prevented it from locating

copies of that Answer to include with its Motion to Reopen. In lieu of records or certified mail receipts, Dynamic's representative averred via affidavit that he received the show cause order and personally mailed the operator's response in October 2014. Dynamic stated that it reasonably believed that Answer had been accepted by the Commission because it received no communication from the Office of the Administrative Law Judge regarding dismissal. Following the October 5, 2015, Notice from the Commission's docket office, Dynamic drafted a second Answer and mailed it immediately.

On January 7, 2016, the Secretary filed an opposition to Dynamic's Motion to Reopen. The Secretary asserts that Dynamic has failed to establish good cause for its failure to file an Answer or timely respond to the Show Cause Order.

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).

The party 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 timely contest the penalty or answer the Secretary's petition, and any delays in filing for reopening:

> An operator seeking to reopen a proceeding after a final order is effective bears the burden of establishing an entitlement to extraordinary relief. At a minimum, the applicant for such relief must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure. . . . Affidavits from persons involved in and knowledgeable of the situation and pertinent documents should be included with the request to reopen.

Higgins Stone Co., 32 FMSHRC 33, 34 (Jan. 2010); *see also Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3345 (Nov. 2013).

We find that Dynamic has failed to meet this burden here. With respect to its failure to timely respond to the Show Cause Order, Dynamic claims that it filed a Response via certified mail. Dynamics implies that this Response was lost in transit. A copy of Dynamic's response should have been sent to both the Commission and the Secretary per Commission Procedural Rule 7(a). 29 C.F.R. §7200.7(a). Neither the Commission nor the Secretary has a record of any such response. Dynamic submitted no certified mail receipts to confirm that a Response was sent in October 2014. These physical receipts would not have been lost as the result of computer issues.

Dynamic was also unable to locate a copy of the Answer that it claims it filed in response to the Order to Show Cause.[1] In fact, citing an absence of computer records, Dynamic claims that it prepared another Answer dated July 8, 2015. The absence of records compounds the movant's failure to prepare and submit timely and appropriate responses and indicates that Dynamic's failure to timely file its response to the Show Cause order was the result of an inadequate internal processing system, which is not a basis for reopening an assessment. *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); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008).

Moreover, as the Secretary points out, in addition to this case, Dynamic has a record of 16 delinquent penalties totaling over $131,000 dating back to 2012. It is important that a party seeking the extraordinary relief of reopening a final order demonstrate good faith, *See Pioneer Inc. Serves. Co. V. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 295 (1993), *FG Hemisphere Assocs., LLC. V. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006). Dynamic's record of unpaid final assessments is evidence of an absence of good faith and militates against the grant of such extraordinary relief. *See Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3348-49 (Nov. 2013); *Oak Grove Res., LLC*, 33 FMSHRC 1130, 1132 (June 2011).

[1] Dynamic's assertion that it was misled by the Commission to believe that the Response was received because no dismissal order was issued in this matter is without merit. The Order to Show Cause explicitly states, "[i]f you do not file an answer within [30 days], you will be in default under the terms of this order on the 31st day after the date of this order. *No further orders will be issued.*" (emphasis added).

As a result, we find that Dynamic failed to meet its burden of establishing good cause for failing to meet the deadline contained in the Order to Show Cause.[2] Accordingly, we find that the operator has failed to demonstrate an entitlement to extraordinary relief, and thus we deny Dynamic's motion.

William I. Althen, Acting Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

[2] Having determined that Dynamic failed without good cause to timely file a Response to the Show Cause Order, it is not necessary to determine whether the operator had good cause in missing the initial deadline for filing an Answer. The Chief Judge properly entered a default judgment and there is no reason to grant relief. Nonetheless, the Secretary provided evidence showing that it mailed the Petition for Assessment to the correct address for Dynamic. Dynamic should have been aware that Petition for Assessment would be sent within 45 days but it never questioned why it had not received the petition for months. The files of Dynamic's representative were, admittedly, in disarray and the operator had difficulty locating old documents, including its alleged initial Answer filed in response to the Order to Show Cause. It seems likely that the operator received the Petition for Assessment, but misplaced it before contesting it. The operator's inadequate internal processing system, as we noted above, would not be a sufficient excuse.

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