

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR,
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),
AUG 30 2018

v.

ESSROC CEMENT CORPORATION

:
:
: Docket No. WEVA 2016-350-M
: A.C. No. 46-00007-405740
:
:

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 3, 2016, the Commission received from Essroc Cement Corp. (“Essroc”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On April 11, 2016, counsel for the Secretary of Labor filed a Petition for Assessment of Civil Penalty in this matter. According to the Secretary’s mailing records, a representative for Essroc received the petition at the operator’s plant in Martinsburg, WV, on April 15, 2016. Essroc failed to file an Answer to the penalty petition. On May 18, 2016, the Chief Administrative Law Judge issued an Order to Show Cause directing Essroc to file an answer in this matter within 30 days of the order or be held in default. By its terms, the Order to Show Cause was deemed a Default Order on June 20, 2016, when the operator failed to file an answer within 31 days.

In its Motion to Reopen, Essroc alleged that it never received the Secretary’s April 11 Petition for Assessment of Civil Penalty. In support of its motion, Essroc provided an affidavit by the safety manager at Essroc’s Martinsburg Plant who avers that he filed the contest paperwork in this matter but, “[n]either I nor anyone else at Essroc received any additional paperwork from MSHA such as a Petition for Assessment of Civil Penalty.” The affidavit further asserted that the operator learned of the default in this matter when it received a notice of delinquency from MSHA on around August 8, 2016.

On November 8, 2016, the Secretary filed a response opposing Essroc’s motion to reopen. Emphasizing that an Essroc employee had signed for the civil penalty petition, the Secretary asserted that Essroc’s motion to reopen rested “on an assertion that appears to be factually incorrect.”

On January 9, 2017, Essroc filed a Response to the Secretary's opposition to the motion to reopen. In its response, Essroc conceded that it received the Secretary's civil penalty petition but asserted that the individual responsible for filing an answer in the case was unable to do so because of an unusual surge in work duties. Essroc supported its Response with a new affidavit from Christine Blackston, the safety and regulatory compliance manager at the mine's parent company who was in charge of coordinating the operator's responses to MSHA civil penalty petitions.

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).

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. *See Dynamic Energy, Inc.*, 39 FMSHRC 1560, 1561 (Aug. 2017); *Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010); *Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3345 (Nov. 2013).

We find that Essroc has failed to meet its burden here. Essroc failed to respond to both the Secretary's civil penalty petition and the Commission Chief Administrative Law Judge's subsequent show cause order, despite receiving both documents. Although Essroc learned of its default in this matter in early August 2016, the operator did not file a motion to reopen with the Commission for approximately two months.¹ Even then, Essroc's motion to the Commission and the sworn affidavit supporting the operator's request contained material misstatements about these proceedings. After the Secretary notified Essroc of these errors, the operator still took nearly two months to identify its errors in this matter and correct the inaccuracies in Essroc's

¹ Essroc's motion to reopen does not explain why the operator delayed in filing its motion to reopen for nearly two months after receiving a delinquency notice from the Secretary. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion).

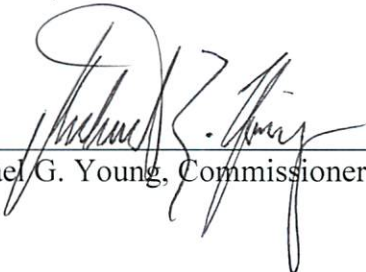
filings with the Commission. As a result, we find that Essroc failed to meet its burden of establishing good cause for failing to meet the deadline contained in the Order to Show Cause. Accordingly, we find that the operator has failed to demonstrate an entitlement to relief, and thus we deny Essroc's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




William I. Althen, Acting Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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