

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N.W., SUITE 9500
WASHINGTON, D.C. 20001
(202) 434-9933

August 8, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2010-509
Petitioner	:	A.C. No. 46-08884-206855
v.	:	
	:	
COAL COUNTRY MINING,	:	Mine No. 58
Respondent	:	

ORDER ON SECRETARY’S MOTION FOR DEFAULT

The Secretary has filed a motion for default judgment “affirming the inspectors’ findings regarding gravity and negligence and the Secretary’s representations regarding the Respondent’s prior history of violations, size, ability to continue in business, and good faith abatement for Citation Nos. 8093615, 8093616, 8093619, 8098370, 8098372, and 809373; and that an Order be issued directing the Respondent to pay in full the \$3,971.00 in civil penalties assessed.”¹ Motion at 1. The Secretary notes that, per this Court’s Prehearing Order, the prehearing exchange was to have occurred by July 18, 2011. In the Motion the Secretary adds that it has made several attempts to at least discuss the possibility of settlement. In fairness, the Respondent’s representative, as related in the Secretary’s Motion, advised the Secretary that his client had closed his business and that he was “trying desperately to contact him.” *Id.* at 4.

The Secretary maintains that the failures of the Respondent’s representative to confer regarding settlement and to exchange the information for hearing, both required by the Court’s Prehearing Order, constitute bases for default. *Id.* at 5. Respondent’s representative filed its opposition to the motion. While other matters were included in the opposition, the Court notes here only facts it deems to be essential to the present motion. Essentially, the representative has

¹ Oddly, the Secretary’s motion does not ask that the standards cited be determined to have been violated, seeking only the associated findings such as gravity and negligence, among others. As the Secretary does not ask that the violations themselves be found to have occurred, the associated findings cannot be found until after such determinations have been made. Thus, among other shortcomings in its motion, one cannot seek the imposition of the proposed penalty amounts until the violations have been found first.

provided reasons for deficiencies with its prehearing exchange requirements. As of the date of its Opposition to the motion, Respondent's representative relates that it now has provided a list of witnesses to the Secretary, that it is searching for documents requested by the Secretary and that the parties have set depositions for August 11th and 12th, 2011. The Opposition also relates that Darrell Felts, owner of Respondent Coal Country Mining, Inc., wants his opportunity for a hearing in this matter and that prior deficiencies with the prehearing order have been explained on the basis that the Respondent had abandoned his business and that difficulties in contacting Felts has been explained by the representative.

The Court agrees that default is a harsh remedy² and in that light has determined that the Respondent's representative has put forth sufficient information to establish that it would be unwarranted at least at this juncture in the proceeding. However, as the Court noted in its August 5th email to the parties, "the Respondent is advised that any failure to exchange exhibits and identify witnesses can adversely affect the evidence it will be permitted to offer at the hearing. The shorter the time before the hearing for disclosure of such information, the greater the likelihood that such evidence or witnesses may be precluded from being part of the evidentiary record. The Court's prehearing order speaks to the parties' obligations for prehearing exchanges."

Accordingly, the Secretary's Motion is DENIED. However, Respondent is particularly advised that, per 29 C.F.R. § 2700.66, failure "to comply with an order of the Judge or these rules" can result in an Order to Show Cause requiring the impacted party to demonstrate why default would not be warranted.

William B. Moran
Administrative Law Judge

² In numerous instances, most recently in July 2011, the Commission has 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 permitted. *Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Cam Mining, LLC*, 2011 WL 3223839 (F.M.S.H.R.C.), citing *Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). At least at this point in these proceedings, there is no call for a show cause order to be issued.

Distribution:

Matthew Ross, Esquire, Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd,
22nd Floor West, Arlington, VA 22209-2247

James F. Bowman, Bowman Industries, LLC, P.O. Box 99, Midway, WV 25878