FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

MAR 29 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. CENT 2015-71-M
v.	:	
NORANDA ALUMINA, LLC	:	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act") and comes to the Commission on remand from the United States Court of Appeals for the Fifth Circuit. *Noranda Alumina, LLC v. Perez*, 841 F.3d 661 (5th Cir. 2016). The Court directed the Commission to review our denial of a motion filed by Noranda Alumina, LLC ("Noranda") to reopen a final order assessing a penalty. The Court determined that the Commission must explain and apply the factors it considers when denying a motion to reopen on the ground of inadequate internal procedures. Consistent with the Court's decision and our re-analysis of the facts, on remand we grant the motion to reopen.

I.

Factual Background

Noranda operates an alumina refinery near Gramercy, Louisiana. In March or April 2014, a contractor detected mercury in Noranda's facility. The Department of Labor's Mine Safety and Health Administration ("MSHA") inspected the facility and issued two citations to the operator for failing to test for mercury. The operator participated in a safety and health conference with MSHA on June 12, 2014, but failed to persuade MSHA to change the citations.

MSHA proposed a penalty assessment for the citations, which was delivered to the operator on July 18, 2014. However, Louis DeRose, the Environmental Safety and Health Manager who handled proposed assessments for Noranda, unexpectedly quit on that day. Therefore, the proposed assessment was handled by Environmental Manager Bud Preston and Plant Manager Dave Hamling. Preston, who was not familiar with MSHA procedures and mistakenly believed the proposed assessment was a bill, asked Hamling whether it should be paid. Hamling approved the payment, which was made by check dated July 25, 2014.

Noranda filed a motion to reopen the penalty assessment at issue on October 31, 2014. The operator claimed that it had always intended to contest the citations and that it had inadvertently paid the proposed assessment. The Secretary opposed the request to reopen, arguing that the operator failed to timely contest the assessment because of its inadequate internal procedures.

On December 18, 2015, the Commission issued an order denying Noranda's motion to reopen this matter. *Noranda Alumina LLC,* 37 FMSHRC 2731 (Dec. 2015). The Commission agreed with the Secretary's characterization of Noranda's procedures as inadequate. The Commission stated that, "Here, the failure to timely contest the proposed assessment after the departure of the individual who previously handled such matters represents an inadequate internal processing system and fails to establish good cause for reopening a final order."

On November 8, 2016, the Court of Appeals for the Fifth Circuit vacated and remanded the Commission's decision. The Fifth Circuit found that the Commission had selectively applied its rule that inadequate procedures warrant denial of an operator's motion to reopen. On remand, the Fifth Circuit directed the Commission to explain the factors it considers when it denies a motion to reopen on the basis of inadequate procedures and to apply those factors to this case. 841 F.3d at 669.

II.

Legal Principles Applicable to Motions to Reopen Final Penalty Assessments

Under section 105(a) of the Mine Act, the Secretary must notify a mine operator of the proposed civil penalty for the issuance of any citation or order. 30 U.S.C. § 815(a). In turn, an operator who wishes to contest a proposed penalty must notify the Secretary no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary of its contest within the 30-day period, the proposed penalty assessment becomes a final order of the Commission by operation of the statute. *Id.*

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission finds guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which a party may be relieved from a final order of the Commission upon a showing of mistake, inadvertence, surprise, 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"); *JWR*, 15 FMSHRC at 787.

Reopening a penalty that has become final is extraordinary relief. Thus, the operator has the burden of showing that it is entitled to such relief, through a detailed explanation of its failure to timely contest the penalty and any delays in filing for reopening:

> 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

Higgins Stone Co., 32 FMSHRC 33, 34 (Jan. 2010).

In reviewing an operator's explanation, we consider the entire range of factors relevant to determining whether the operator's error was the result of mistake, inadvertence, surprise, excusable neglect, or another good faith reason. No precise formula exists for weighing the factors, and the analysis is conducted on a case-by-case basis. However, key factors are identifiable. The Commission has provided guidance to operators on its website explaining the factors that will generally be considered in determining whether to grant relief:

> The Commission has considered a number of factors in determining whether good cause exists: (1) the error does not reflect indifference, inattention, inadequate or unreliable office procedures or general carelessness; (2) the error resulted from mistakes that the operator typically does not make; (3) procedures to prevent, identify and correct such mistakes have been adopted or changed, as appropriate; (4) . . . A proper motion must also provide all relevant documentation and identify the persons who have knowledge of the circumstances. . . . Your motion should also be supported by affidavit(s) of (a) person(s) with direct knowledge of the underlying facts. Motions for relief must identify and explain: (1) why a timely contest was not filed; (2) how and when you first discovered the failure to timely contest the penalty and how you responded once this was discovered. (3) If the motion to reopen was filed more than 30 days after you first learned that the penalty was not timely contested, you must provide a reasonable explanation for the delay or your motion may be DENIED.

FMSHRC, *Requests to Reopen*,
https://www.fmshrc.gov/content/requests-reopen (last visited March 28, 2017).

In addition, it is important to consider the good faith of the operator's actions and whether MSHA opposed the motion to reopen. *Pioneer Inv. Servs. Co. v. Brunswick Associated Ltd. P'ship*, 507 U.S. 380, 395 (1993); *FC Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006); *Oak Grove Res. LLC*, 33 FMSHRC 1130, 1132 (June 2011). To justify reopening, an operator's detailed recounting of the circumstances should demonstrate that the operator acted at all times in good faith and without any purpose of evasion or delay, taking into account the nature of the violation, the amount of the penalty, and the circumstances of receipt and processing of the proposed assessment. The operator's motion

should also address whether errors were within the operator's control, and the reasons for any delay in filing the motion itself, especially after notice of the delinquency.

III.

Disposition

In accordance with the Fifth Circuit's remand, the Commission again considers Noranda's motion to reopen. In this case, the operator had implemented an internal processing system by designating an employee to determine which assessments to contest and which to pay. On the day the proposed assessment was delivered, this employee left the company. In his absence, other employees who were not as familiar with MSHA's assessment process mistakenly decided to pay the proposed assessment.

We have held that the inadvertent payment of a proposed assessment and the Secretary's opposition to a motion to reopen do not necessarily justify denial of an operator's motion to reopen. *See Kaiser Cement Corp.*, 23 FMSHRC 374, 375-76 (Apr. 2001); *Doe Run Co.*, 21 FMSHRC 1183, 1184-85 (Nov. 1999) (assessments reopened after the operator inadvertently paid the assessments); *Pinnacle,* 38 FMSHRC 422, 423 (Mar. 2016) (assessment reopened despite Secretary's opposition). Thus, we must consider whether the totality of circumstances surrounding Noranda's failure to timely contest the assessment justifies denial of its motion to reopen because they demonstrate that the failure resulted from inadequate internal processing procedures. See, e.g., *Oak GroveRes., 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).[1]

In determining whether inadequate procedures warrant denial of a motion to reopen, we review an operator's procedures for handling proposed MSHA assessments. We also consider the reason(s) for the failure of the internal processing system and the operator's efforts to correct any such flaws.

As stated on the Commission's website, we consider whether the failure to timely contest an assessment resulted from a unique occurrence, *i.e.*, a mistake that the operator usually does not make. FMSHRC, *Requests to Reopen.* Here, the company had an existing internal processing system prior to receiving this proposed assessment. It had assigned its safety director to manage assessments. We find that this system failed because of a unique occurrence. The

[1] On appeal, the Fifth Circuit constrained its analysis of Noranda's request to the factors the Commission relied upon in denying Noranda's motion. 841 F.3d at 666. On remand, we similarly limit our consideration to those factors. Thus, although Noranda did not seek to re-open the final order at issue for more than two months - including more than 30 days after discovering its default - and did not explain why it did not act sooner, the Secretary did not raise the delay in his opposition to the motion, and the Commission did not identify it as a reason for denying Noranda's motion to reopen. Accordingly, we do not now consider this factor as part of our analysis.

operator received the assessment on a day when there was no employee designated to handle assessments because the safety director unexpectedly left the company on the day the proposed assessment was delivered. The subsequent payment of the assessment constituted an inadvertent mistake.

Upon further review of the assertions before us, we determine that Noranda has demonstrated sufficient circumstances to explain the failure of its internal processing system. After the unanticipated departure of its safety director, Noranda paid the assessment inadvertently rather than ignoring it. This fact supports the operator's assertion of good faith. We also note that Noranda's efforts to seek a conference with MSHA support the operator's asserted intent to contest the citations. The motion was factually well-supported and documented the operator's mistake and the attendant circumstances. Finally, this operator does not have a history demonstrating a general carelessness or lack of attention to MSHA assessments.

Upon reconsideration of all the evidence, we determine that the operator had been diligent in seeking to implement an effective internal processing system for handling proposed assessments and that the proposed assessment at issue should be reopened.

IV.

Conclusion

Having reviewed Noranda's motion to reopen, we reopen this matter and remand it 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. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

William I. Althen, Acting Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution

Avi Meyerstein
Henry Chajet
Brian Hendrix
Jillian R. Orticelli
10701 Parkridge Blvd., Suite 300
Reston, VA 20191
Avi.meyerstein@jacksonlewis.com
Henry.chajet@jacksonlewis.com
Brian.hendrix@jacksonlewis.com
Jillian.orticelli@jacksonlewis.com

W. Christian Schumann, Esq.
Office of the Solicitor
US Department of Labor
201 12th St. South-Suite 401
Arlington, VA 22202-5450

Melanie Garris
Office of Civil Penalty Compliance, MSHA
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety Health Review Commission
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710