# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | Docket No. VA 2014-243 |
| | : | Docket No. VA 2014-244 |
| | : | Docket No. VA 2014-364 |
| v. | : | Docket No. VA 2014-365 |
| | : | Docket No. VA 2014-383 |
| A & G Coal Corporation | : | |

## DIRECTION FOR REVIEW AND ORDER

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On August 16, 2017, after a representative of A & G Coal Corporation ("A & G") failed to appear for a previously scheduled conference call, a Commission Administrative Law Judge issued an Order to Show Cause directing the operator to respond by August 28, 2017, or risk being held in default. On August 30, 2017, not having received a response from A & G, the Judge issued an Order of Default dismissing the civil penalty proceedings.

On September 29, 2017, the Commission received a Petition for Discretionary Review from A & G seeking to set aside the Judge's Order of Default and remand the matter to the Judge for a hearing. PDR at 1. A & G's petition implicates several questions, including whether the Order to Show Cause was appropriate in this matter, whether procedural defects existed with the show cause order, and whether the process the Judge followed complied with the due process requirements of the Constitution. Foremost, although the Judge received confirmation that the show cause order was received and signed for,[1] Order of Default at 1–2, in an affidavit supporting A & G's petition, a representative for the operator avers that he did not receive the Judge's August 16 show cause order and could not find anyone in the company's offices who had received the order. Aff. of Patrick Graham at 3. A & G asserts that it only learned of the show cause order when the operator received the Judge's default order. PDR at 4. The representative acknowledges that he failed to appear at the conference call, and he avers that he

[1] The record contains a certified mail delivery receipt showing a signature by Leslie Wells.

had intended to contact A & G's legal counsel to advise him of the call but failed to do so. Aff. of Patrick Graham at 2.[2]

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). We hereby grant A & G's timely filed petition for discretionary review.

In evaluating requests for relief from orders of default, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure and has granted relief on the basis of mistake, inadvertence, excusable neglect, or another 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, 787 (May 1993). We also have 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. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

A & G alleges that it did not timely respond to the Judge's Order to Show Cause because the official representing the operator in this matter did not receive the order. The present record is not clear as to what happened to the show cause order after it was delivered and signed for.[3]

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[2] We appreciate our colleague's views, but agree with him that it is premature to rule on the issues he raises in his separate opinion. No inference relevant to the merits of this case should be drawn from our decision to neither join nor rebut his suggestions on those issues.

[3] According to the Commission's records, both the show cause order and the subsequent default order were sent to Southern Coal Corporation at an address in Roanoke, VA. It appears that, at least at one time, Southern Coal Corporation was affiliated with A & G. Aff. of Patrick Graham at 2. Although this address does not otherwise appear in the record, A & G acknowledges receiving the Order of Default, but not the Order to Show Cause.

Having reviewed A & G's request, in the interest of justice, we remand this matter to the Judge to determine whether relief from the default is warranted and for further proceedings as appropriate pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Acting Chairman Althen, concurring:

In order to form a unanimous decision, I join in the Commission's remand. I write separately to note that the present order pretermits the path I would have preferred. I would have granted review of whether the Judge abused his discretion in issuing a default order for $321,000 in a factually contested proceeding with the parties engaged in settlement discussions as a sanction for missing a telephone conference on whether to extend a stay.[1] A fully articulated decision by the Commission would have provided guidance for future considerations of default.

Because we have not granted review of that issue and the parties have not briefed it, it would be premature to opine on the outcome of such a review. Nonetheless, for purposes of the Judge's reconsideration and for use in other default proceedings, I find it useful to discuss basic default principles. Of course, I write only my understanding of default principles.

All Commissioners agree that default is a harsh remedy. It is not an action for a Judge to take merely because he/she has the power to do so. Declaring a default in an ongoing contested action requires a careful analysis and explanation of the basis for such harsh action.

Indeed, along with us, federal courts have emphasized the harshness of default and their strong disfavor of defaults of contested cases.[2] The D.C. Circuit has stated: "Default judgments are not favored by modern courts, perhaps because it seems inherently unfair to use the court's power to enter and enforce judgments as a penalty for delays in filing. Modern courts are also reluctant to enter and enforce judgments unwarranted by the facts." *Jackson v. Beech*, 636 F.2d 831, 835 (D.C. Cir. 1980). If a party is seeking relief from a default, "all doubts are resolved in favor of the party seeking relief." *Id.* at 836. In *E.F. Hutton & Co., Inc. v. Moffatt*, the Fifth Circuit opined that "[t]he entry of judgment by default is a drastic remedy and should be resorted to only in extreme situations." 460 F.2d 284, 285 (5th Cir. 1972). Much more recently, in *Drone Technologies, Inc. v. Parrot S.A., Parrot Inc.*, the Federal Circuit examined the Third Circuit's standards and found the following:

> A dismissal or default is a "drastic" sanction, *Poulis*, 747 F.2d at 867, which is why the Third Circuit has "established [a] strong presumption against sanctions that decide the issues of a case," *Ali*, 788 F.2d at 958. Accordingly, a dismissal or default sanction is "disfavored absent the most egregious circumstances." *United States v. $8,221,877.16 in U.S. Currency*, 330 F.3d 141, 161 (3d Cir. 2003).

838 F.3d 1283, 1301 (Fed. Cir. 2016).

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[1] Our resolution also avoids possible sua sponte discussion of whether, upon default, a Judge may assess the penalty sought by MSHA without evidence on, or consideration of, the penalty factors the Mine Act requires the Commission itself to consider in assessing penalties. Notably, the Commission's procedural rules require Judges entering default orders to assess "appropriate penalties," not simply those proposed by the Secretary. 29 C.F.R. § 2700.66(c).

[2] This is not a case where the operator failed to contest the citation or penalty.

In deciding default issues, the Third Circuit developed a six factor test of: (1) the extent of the party's personal responsibility; (2) whether the party had a history of dilatoriness; (3) whether the conduct of the party or the attorney was willful or in bad faith; (4) the meritoriousness of claims or defenses; (5) the prejudice to the adversary caused by the party's conduct; and (6) the effectiveness of sanctions other than dismissal or default. *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984). Separately, courts within the District of Columbia Circuit "must consider whether '(1) the default was willful, (2) a set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious.'" *Gray v. Staley*, 310 F.R.D. 32, 35 (D.D.C. 2015) (quoting *Keegel v. Key West & Caribbean Trading Co., Inc.*, 627 F.2d 372, 373 (D.C. Cir. 1980)).

Summarized, these tests provide a consistent basis for considering default. Analysis starts with the premise that default is a drastic sanction warranted only by egregious circumstances. With that premise, a party's actions warrant default when, on balance, the party is acting willfully for a nefarious purpose such as deliberate delay or avoidance of discovery, the other party suffers prejudice, the defaulter does not have a reasonable contested case, and lesser sanctions would not satisfy the ends of justice.

The Judge must evaluate whether a failure is a willful action, taking into account prior conduct during the proceeding. Here, this factor would require an analysis of whether the failure to be on the scheduling conference call indicated a willful action—that is, an action tantamount to expression of a desire not to contest the case or an attempt to subvert proper prosecution of the case.

In this respect, it is notable, as my colleagues point out, that the record involves ambiguities.[3] Importantly, my colleagues note that Patrick Graham filed an affidavit stating that he had intended to notify the operator's legal counsel of the scheduling of the status conference but did not do so. This highlights that the operator had notified the Judge of a substitution of counsel and provided the name, address, and email of the new lawyer. Notice of Withdrawal and Substitution of Counsel, filed January 27, 2017.

That lawyer failed to enter a formal notice of appearance, as he should have. However, after the prior representative withdrew and notified the court of the name and address of new counsel, the Judge was aware that the party had designated a new legal counsel. Either the court failed to note the substitution of counsel or did not accept it prior to a formal entry of appearance. In either event, the Judge sent neither the notice of the telephone conference to discuss the stay nor the Order to Show Cause to the attorney designated by the operator as its representative. The Fifth Circuit has held that "[t]he plaintiff should not be punished for his

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[3] The emailed Order to Show Cause did not go through. The show cause order apparently was mailed to an address that was not the address of record. The corporate addressee on the show cause order was Southern Coal Corporation rather than A&G Coal. Apparently, the person addressed, Patrick Graham, had not entered an appearance as a representative of the party. A person named Leslie Wells signed for the mailed notice of the show cause order, but the Judge addressed the notice to Southern Coal Corporation, and it is not clear who employed Wells. Now, Graham swears that he did not receive the show cause order.

attorney's mistake absent a clear record of delay, willful contempt or contumacious conduct." *Blois v. Friday*, 612 F.2d 938, 940 (5th Cir. 1980). A Judge must be mindful that "[d]efault judgments were not designed as a means of disciplining the bar at the expense of the litigants' day in court." *Jackson*, 636 F.2d at 837.

As a second factor in a default case, a Judge must consider whether the other party has suffered any meaningful prejudice from the missed action. Here, that action is a missed telephone conference on whether to extend an already lengthy and agreed to stay. Meanwhile, it appears the parties were actively discussing settlement.

Another factor is the merits of the party's positon—that is, is the matter a contested action in which the party advances a substantive position. Here, because the Judge had stayed this case, it is not clear whether there was a basis in the record to evaluate the merits of the case. However, the Secretary had not sought summary judgment. Further, given the occurrence of settlement discussions, there obviously were disputed facts. Indeed, the occurrence of settlement discussions suggests the Secretary may have been amenable to resolving all matters for a lesser penalty than MSHA's original assessment. The missed conference call was on a non-substantive issue rather than a matter such as refusing discovery or a motion for summary judgment.

Another consideration is whether a lesser sanction than default could effectively remediate the party's failure. Here, for example, the Judge might have considered whether ending the stay and setting the case for hearing would have effectively sanctioned the operator for missing the telephone conference on that scheduling matter while permitting the contest of the $321,000 penalty to continue.

In short, using this case as an example, the bottom-line question is whether the failure to join a telephone conference call to discuss lifting the stay and setting a hearing date in a $321,000 case with contested facts, ongoing discussions of settlement, and the attorney desired by the operator not contacted warranted a default and immediate imposition of the MSHA-assessed $321,000 penalty. As noted at the outset, the parties have not briefed that question. I specifically do not express any opinion on whether I would have found an abuse of discretion.

William I. Althen, Acting Chairman

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