FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

December 9, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2019-0226
v.	:	A.C. No. 46-09075-481854
VIRGINIA DRILLING COMPANY, LLC	:	

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY: Althen and Rajkovich, Commissioners:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On July 23, 2019, the Commission received from Virginia Drilling Company, LLC ("Virginia Drilling") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

The proposed assessment was delivered to the operator on January 25, 2019. The operator timely contested the assessment on February 4, 2019. MSHA issued a penalty petition on February 19, 2019.[1]

On April 2, 2019, the Acting Chief Administrative Law Judge issued an Order to Show Cause in response to Virginia Drilling's perceived failure to answer the Petition for Assessment of Civil Penalty, filed by the Secretary of Labor on February 19, 2019. By its terms, the Order to Show Cause was deemed a Default Order on April 23, 2019, when it appeared that the operator had failed to respond to the Show Cause Order within 20 days.

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, here the Judge's order became a final order

[1] The penalty petition incorrectly listed the total civil penalty as $8,863, as opposed to the actual amount of $9,863. Pet. for Civil Penalty at 3, Ex. A; Del. Not.

of the Commission on June 3, 2019. On July 9, 2019, MSHA mailed a delinquency notice to the operator.

The operator seeks to reopen this matter, claiming that it never received the "Secretary of Labor's Order of Assignment and Pre-Hearing Order." The operator states an intent to file an answer in a timely manner upon receipt of such order. The Secretary does not oppose the "Request to Reopen," but requests that Virginia Drilling take its obligations seriously.

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).

In this case, we must consider whether the operator demonstrated that it acted in good faith, and whether the Secretary opposes the motion or alleges that the operator acted in bad faith. *Noranda Alumina, LLC*, 39 FMSHRC 441, 444 (Mar. 2017). Here, the operator demonstrated good faith by timely contesting the proposed penalty, and by filing its request to reopen within 30 days of receiving the delinquency notification. Moreover, the operator provided a document, entitled "Notice of Contest" and hand dated March 11, 2019, briefly stating why the operator disagrees with each violation. This further indicates that the operator had a desire to proceed with litigation. Notably, the Secretary does not oppose the motion or allege that the operator acted in bad faith.[2]

[2] The Secretary makes no comment about the March 11, 2019 document, or the operator's claim that it did not receive an Order of Assignment or Pre-Hearing Order for this proceeding.

Having reviewed Virginia Drilling's request and the Secretary's response, we find that the evidence demonstrates the operator's good faith and that the failure to timely file an answer was the result of excusable neglect. In the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded 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.

William I. Althen, Commissioner

Marco M. Rajkovich, Jr., Commissioner

Chair Traynor dissenting:

I dissent from the majority's erroneous decision to reopen the final orders in this proceeding. The majority determines – without evidence – that Virginia Drilling has established "good cause" for its failure to respond to both the Secretary of Labor's Penalty Petition and the Commission's Order to Show Cause.[1] Slip op. at 3. Because the operator's motion does not address whether it had a "good cause" reason for its failures to respond to both aforementioned documents, it fails to set forth grounds for relief. That the operator has demonstrated "good faith" in filing its motion is not sufficient to establish "good cause."[2]

My colleagues purport to ground their decision in *Noranda Alumina, LLC*, 39 FMSHRC 441 (Mar. 2017). However, they do not articulate a rationale for their decision to find good cause for Virginia Drilling's failure to timely respond based upon any one or more of the relevant factors outlined in *Noranda*.[3] Under *Noranda*, a finding the operator has brought its motion in good faith, while relevant, does not by itself resolve the question of whether there was good cause for the failure to respond.

Virginia Drilling's motion is incomplete as it does not address the critical element of good cause for its failure to timely respond. However, given that the operator is appearing before the Commission *pro se* and does not have a history of filing motions to reopen defaults, I would have remanded this matter to our Chief Administrative Law Judge and given Virginia Drilling the opportunity to make the necessary case regarding good cause, whether by reference to the *Noranda* factors or other considerations relevant to good cause for the failure to timely respond (as distinguished from the separate inquiry into whether the motion is brought in good faith). *See, e.g., Monongalia County Coal Co*., Docket No. PENN 2020-0004 et al. (Sept. 8, 2021).

[1] More specifically, the majority finds that the operator established that its failure to respond to the Secretary or the Commission was the result of "excusable neglect." Slip op. at 3. Notably, the operator's motion references neither the receipt nor processing of either document.

[2] Stated another way, the operator's prompt remedial efforts do not excuse its prior failures to respond in the absence of a sufficient accounting of whether there was "good cause" for that failure.

[3] The hand-dated document referenced by the majority in their decision is a copy of the original letter contesting the civil penalties. Sec'y's Response (exhibit, page 13). Furthermore, the majority notes that the Secretary did not respond to Virginia Drilling's claim that it did not receive an Order of Assignment or Pre-Hearing Order from the Commission. Slip op. at 2 n.2. Of course, no response was necessary; the case was not assigned to a Judge because Virginia Drilling did not file the required Answer to the Penalty Petition and thus was in *default*.

I.

Legal Standard

In *Noranda,* the Commission stated that it considers whether the operator's motion to reopen a final order provides sufficient detail and explanation of facts and circumstances surrounding the movant's default to determine whether there is "good cause" to reopen the case. The opinion in that case clearly distinguishes between the concepts of good cause and good faith as applied in the contexts of motions to reopen and so I quote it extensively as follows:

> 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:
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> 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.
>
> In addition, it is important to consider the good faith of the operator's actions and whether MSHA opposed the motion to reopen. 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.

Noranda, 39 FMSHRC at 443-444 (some internal citations omitted).

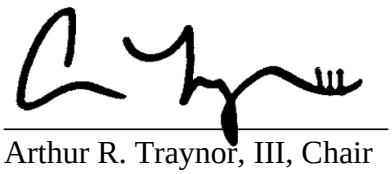
II.

Virginia Drilling's Motion to Reopen

On February 19, 2019, the Secretary of Labor issued the operator the Petition for Assessment of Civil Penalties. On April 2, 2019, having not received the required Answer to the Petition, the Commission's Acting Chief Administrative Law Judge issued an Order to Show Cause. Virginia Drilling did not respond to the Order to Show Cause, and thus by terms of the Order was in default on April 23, 2019. On July 9, 2019, the Secretary issued a delinquency notice to the operator. On July 23, 2019, the operator filed its motion to reopen.

Virginia Drilling's motion fails to address its receipt or processing of either the Penalty Petition or the Order to Show Cause. It contains *none* of what we said in *Noranda* is the *minimum* necessary to demonstrate an entitlement to relief, including "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." *Id.* Accordingly, it is not possible to determine whether the operator's multiple failures were the result of "excusable neglect" or conversely whether its neglect was the result of an inadequate or unreliable internal processing system. *See Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011).

I would have remanded the matter to the Chief Administrative Law Judge to provide Virginia Drilling the opportunity to supplement its initial filing with an account of its failure to timely respond before default judgment was entered against it.



Arthur R. Traynor, III, Chair

Distribution (e-mail):

Anthony Kidd
Virginia Drilling Company, LLC
P. 0. Box 1198
Vansant, VA 24656
Anthony.kidd@vadrillco.com

John M. McCracken, Esq.
Office of the Solicitor
U.S. Department of Labor
Mine Safety and Health Division
201 12th Street South, Suite 401
Arlington, VA 22202-5452
McCracken.John.M@dol.gov

Archith Ramkumar, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202
Ramkumar.Archith@dol.gov

April Nelson, Esq.
Office of the Solicitor
U.S. Department of Labor
Mine Safety and Health Division
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Nelson.April@dol.gov

Melanie Garris
U.S. Department of Labor
Office of Civil Penalty Compliance
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Garris.Melanie@dol.gov

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov