

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**February 27, 2025**

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

v.

CARVER SAND & GRAVEL, LLC

Docket No. YORK 2024-0049

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

**ORDER**

BY: Chair Jordan and Commissioner Baker

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On April 19, 2024, the Commission received from Carver Sand & Gravel, LLC (“Carver Sand”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a). We have held, however, 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 has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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.

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 permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

MSHA's records indicate that the subject proposed assessment was delivered to Carver Sand on March 9, 2024, and became a final order on April 8, 2024. Carver Sand has fully paid the civil penalty assessment. Sec'y Ex. D

In its motion, Carver Sand states that on April 10, 2024, it emailed MSHA a form to contest the assessment. On April 18, 2024, MSHA responded, rejecting Carver Sand's contest and stating that the deadline to contest was April 8th. CS Ex. 1. Carver Sand disputes the Secretary's calculation of the 30-day contest window. The operator states that it received the assessment on March 11, 2024, and, therefore, the 30-day contest window was open through April 10th.

The Secretary opposes reopening and reaffirms his position that Carver Sand received the assessment on March 9, 2024. The Secretary attached United States Postal Service ("USPS") Tracking Records (Sec'y Ex. B) and the USPS Signature Confirmation (Sec'y Ex. C) to his response, demonstrating that the assessment was signed for by a representative of Carver Sand on March 9, 2024.

Additionally, the Secretary attached evidence that prior to attempting to contest the assessment on April 10, 2024, Carver Sand paid the civil penalty assessment. Sec'y Ex. E at 1 (Carver Sand check dated April 5, 2024). Along with its check, Carver Sand submitted a remittance coupon affirming that payment was earmarked for the subject assessment. *Id.* at 3.

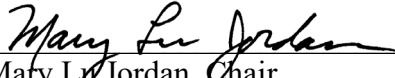
An operator "must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure." *Higgins Stone Co., Inc.*, 32 FMSHRC 33, 34 (Jan. 2010). We conclude based upon the record before us that prior to attempting to contest the assessment on April 10th, Carver Sand submitted payment for the penalties at issue. Notably, in its motion to reopen, Carver Sand neither mentions that it paid the penalties, nor alleges that it submitted payment by mistake.<sup>1</sup>

Instead, we conclude that the record demonstrates that the operator's attempt to contest the penalties on April 10, 2024, represented "a change of mind." It is well recognized that "[a] change of mind is not adequate grounds to reopen a final judgement pursuant to Rule 60(b)." *Cold Spring Granite Co.*, 36 FMSHRC 1559, 1560 (June 2014) (citing *Brzeczek v. Centerior Energy*, 2000 WL 875744, No. 99-3900, slip op. at 1-2 (6th Cir. 2000)).

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<sup>1</sup> The omission of crucial facts brings a showing of good faith into question. *See H&D Mining, Inc.*, 33 FMSHRC 2121, 2123 (Sept. 2011)

Accordingly, for the aforementioned reasons, Carver Sand has not demonstrated good cause to reopen the final order of the Commission and, therefore, its motion is **DENIED** with prejudice.

  
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Mary Lu Jordan, Chair

  
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Timothy J. Baker, Commissioner

Commissioner Marvit, concurring,

I write to agree with the Majority in this case for the reasons set forth below.

In *Explosive Contractors*, 46 FMSHRC 965 (Dec. 2024), I dissented and explained that Congress did not grant the Commission the authority to reopen final orders under section 105(a) of the Mine Act. The Commission’s repeated invocation of Federal Rule of Civil Procedure 60(b) cannot overcome the statutory language. However, in *Belt Tech*, I explained in my concurrence that “the Act clearly states that to become a final order of the Commission, the operator must have received the notification from the Secretary.” 46 FMSHRC 975 (citing *Hancock Materials, Inc.*, 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

In the instant case, as the Majority recounts, the operator received the final order. The Majority denies reopening in its opinion because the operator has not alleged good cause or provided a factual accounting for its failure to timely contest the penalties. Though I believe the Commission lacks the authority to consider motions to reopen, I concur with the Majority in denying reopening in this matter.



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Moshe Z. Marvit, Commissioner

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