FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 9, 2026

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. LEROY'S EXCAVATING, INC.,	Docket No. CENT 2025-0031 A.C. No. 29-02500-602275

BEFORE: Rajkovich, Chair; Jordan, Baker, and Marvit, Commissioners

ORDER

BY: Rajkovich, Chair; Jordan, and Baker, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). On June 23, 2025, the Commission received a motion from Leroy's Excavating, Inc., ("Leroy") seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On February 18, 2025, the Chief Administrative Law Judge issued an Order to Show Cause in response to Leroy's perceived failure to answer the Secretary of Labor's December 16, 2024 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on March 21, 2025, when it appeared that the operator had not filed an answer within 30 days.

Leroy's Excavating asserts neither it nor its attorney received the Commission's Order to Show Cause. The Secretary of Labor opposes the motion, arguing that the Order was properly issued to the operator's attorney. According to the Secretary, a copy of the underlying petition and a notice of appearance were also sent to the operator's counsel. Counsel did not respond to any of these filings.

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, the Judge's order here has become a final decision of the Commission.

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).

The President of Leroy's Excavating represents that neither the operator nor its counsel received the Commission's Order. The Commission sent the Order to Show Cause to the operator's designated attorney. The operator's motion contains no explanation for its attorney's failure to respond. For instance, there is no affidavit attesting to his non-receipt of the Commission's Order. We conclude that in the absence of a sufficient explanation from its counsel, the operator has not demonstrated good cause for its failure to timely respond. *See Higgins Stone Co*., 32 FMSHRC 33, 34 (Jan. 2010) (requiring that "[a]t a minimum, the applicant 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."). Simply stating that the Order was not received is not sufficient. *See Southwest Rock Prods., Inc.*, 45 FMSHRC 747, 748 (Aug. 2023) ("a grant of relief under Rule 60(b) requires more than "general assertions or conclusory statements as to why an operator failed to timely contest'"). Therefore, the motion is denied.

Having reviewed the operator's request and the Secretary's response, we conclude that the operator has failed to establish good cause for a failure to timely file a response to the Commission's Order to Show Cause. The motion is denied.

Marco M. Rajkovich, Jr., Chair

Mary Lu Jordan, Commissioner

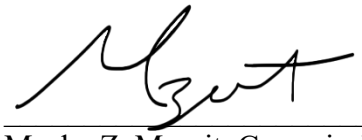
Timothy J. Baker, Commissioner

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 Commission's order became final under the language of section 105(a). 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.



Moshe Z. Marvit, Commissioner

Distribution:

Dale T. Salazar, President
Leroy's Excavating Inc.
2 Private Drive
1529 Hernandez, NM 87537
Leroysexcavating@windstream.net

David Dotson, Esq.
Leroy's Excavating, Inc.
dotsonlawoffices@gmail.com

Alexandra J. Gilewicz, Esq.
Thomas A. Paige, Esq.
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
200 Constitution Avenue NW, Suite N4428
Washington, DC 20210
Gilewicz.Alexandra.J@dol.gov
Paige.Thomas.A@dol.gov

Melanie Garris
US Department of Labor/MSHA
Office of Assessments, Room N3454
200 Constitution Ave NW
Washington, DC 20210
Garris.Melanie@dol.gov

Acting Chief Administrative Law Judge Michael G. Young
Office of the Chief Administrative Law Judge
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
MYoung@fmshrc.gov