FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 27, 2026

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. GORDON SAND CO.	Docket No. WEST 2023-0055 A.C. No. 04-01787-548493

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 December 2, 2022, the Commission received from Gordon Sand Co. ("Gordon") 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 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"); *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).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the U.S. Postal Service attempted delivery of the proposed assessment,

on January 27, 2022, and left a reminder for final pick up before February 5, 2022. On March 15, 2022, the proposed assessment was deemed a final order of the Commission.[1]

On May 2, 2022, MSHA mailed a delinquency notice to the operator. On June 28, 2022, MSHA referred the delinquency to the U.S. Department of the Treasury. On October 6, 2022, MSHA delivered a notice to the operator that it had unpaid civil penalties and costs totaling $25,368.69. Sec's Opp. at 4; Att. B to Sec's Opp.[2] On November 8, 2022, MSHA cited the operator under 110(j) of the Mine Act, 30 U.S.C. § 820(j), for failure to pay the outstanding amount of $25,368.69. Att. B to Sec's Opp ("Scofflaw" Citation No. 9681831).

The operator claims that the individual who dealt with all the mining related issues at the mine passed away in 2020, a couple of years before the operator filed its motion to reopen. The operator alleges that since this individual passed away, it has been struggling to get up to speed with operating the mine, and all outstanding MSHA issues. However, the operator does not provide details regarding its processing system for contesting assessments, or paying assessments that have become final orders.

The Secretary opposes the motion to reopen citing the operator's extensive delinquency history, and the delay in the operator's filing of the motion to reopen after receiving the delinquency notice from MSHA. Sec's Opp. at 9-10. At the time the request to reopen was filed, the operator had 7 unpaid assessments between the years 2018 and 2022, with six of them predating the last—the assessment at issue. *Id.* at 4, 10; Att. C to Sec's Opp. The Secretary further notes that the operator had 17 unpaid assessments between 2006 and 2017. *Id.* at 10; Att. C to Sec's Opp. The Secretary also notes that although she mailed a delinquency notice on May 2, 2022, the operator did not file its motion to reopen until December 2022. *Id.* at 8. Indeed, the Secretary asserts that the operator "filed [its] motion to reopen [in December 2022] only after receiving the scofflaw citation" in November 2022. Sec's Opp. at 9.

It is well recognized in federal jurisprudence that the issue of whether the movant acted in good faith is an important factor in determining the existence of excusable neglect. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 395 (1993); *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006). Likewise, the Commission has recognized that a movant's good faith, or lack thereof, is relevant to a determination of whether the movant has demonstrated mistake, inadvertence, surprise or excusable neglect within the meaning of Rule 60(b)(1) of the Federal Rules of Civil Procedure. *Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3346 (Nov. 2013); *M.M. Sundt Constr. Co.*, 8 FMSHRC 1269, 1271 (Sept. 1986); *Easton Constr. Co.*, 3 FMSHRC 314, 315

[1] Despite the final order date, neither party provides any evidence of when the assessment was picked up by the operator.

[2] The Secretary states that the scofflaw citation penalty of $25,368.69 was based on penalties assessed for "21 citations/orders in 7 different statements ranging from June 2018 to January 2022 (including the [statement at issue])." Sec's Opp. at 4; Att. B to Sec's Opp. However, later the Secretary states that "the scofflaw citation is for 21 unpaid assessments dating back to 2018." Sec's Opp. at 10. Attachment C to the Secretary's Opposition clarifies that aside from the assessment at issue, there are only 6 open (*i.e.* unpaid) assessments dating back to 2018.

(Feb. 1981). In *Stone Zone,* 41 FMSHRC 272, 274 (June 2019), the Commission explicitly clarified that some of the factors relevant to the good faith analysis are the number of outstanding delinquent penalties, and the time period over which such penalties accrued. *See also Kentucky Fuel Corp.*, 38 FMSHRC 632 (April 2016). In addition, the Commission has noted that an operator's filing of a motion to reopen only after MSHA issued a citation for failure to pay penalties is not consistent with an operator acting in good faith. *Stone Zone,* 41 FMSHRC at 274.

The operator, when it filed the motion to reopen, had at least 24 unpaid penalty assessments from 2006 to 2022:(1) 7 unpaid penalty assessments between 2018 and 2022 (including this assessment) and (2) 17 additional unpaid penalty assessments between 2006 and 2017. The operator's record indicates that it has repeatedly disregarded a large number of penalty assessments over a lengthy time frame of sixteen years. The numerous unpaid assessments, "which had accumulated in the years preceding the request to reopen, should have informed the operator of the need to be more attentive to proposed assessments from MSHA." *Stone Zone*, 41 FMSHRC at 275. Indeed, at least 17 of these assessments had accrued before 2018, several years before the death of the individual who was responsible for contacting MSHA, and many years before the Secretary proposed the assessment at issue.

Moreover, the Commission has previously held that "[m]otions to reopen received within 30 days of an operator's receipt of its first notice from MSHA that it has failed to timely file a notice of contest will be presumptively considered as having been filed within a reasonable amount of time." *Highland Mining Co.,* 31 FMSHRC 1313, 1316-17 (Nov. 2009). Here, the motion to reopen was filed in December 2022, 7 months after MSHA mailed the delinquency notice (in May), and two months after MSHA delivered a notice (in October) that the operator had unpaid civil penalties. Therefore, the motion to reopen was not filed within a reasonable amount of time.

Accordingly, we find that the operator has failed to demonstrate an entitlement to extraordinary relief. Therefore, we deny Gordon's motion.

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Marco M. Rajkovich, Jr., Chair

Mary Lu Jordan, Commissioner

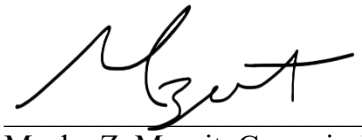
Timothy J. Baker, Commissioner

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

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