

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 6, 2025

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

WAYNE J. SAND & GRAVEL, INC.

Docket No. WEST 2024-0238
A.C. No. 04-01915-599216

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

ORDER

BY: Jordan, Chair; and Baker, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On December 2, 2024, the Commission received from Wayne J. Sand & Gravel, Inc. (“Wayne”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On August 7, 2024, the Chief Administrative Law Judge issued an Order to Show Cause in response to Wayne’s perceived failure to answer the Secretary of Labor’s June 7, 2024 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on September 7, 2024, when the operator had not filed an answer within 30 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, 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).

Wayne asserts that its office secretary is fairly new and unfamiliar with the process of contesting violations and inexperienced with the operator's new e-mail system. According to the operator, this caused her to miss information regarding the Petition and overlook the need to file an answer or response to the Order to Show Cause. Wayne's secretary acknowledges having received the Order to Show Cause on August 7, 2024, but further claims that she "was busy in the office" and that when she "opened the e-mail it was a cov19 [sic] Default order in red printing and [she] . . . didn't scroll down to see a PDF or [that] the message was titled 'Order to show cause of default [sic].'" WJS Mot. at 1. Wayne requests the case be reopened to continue litigating the citations.

The Secretary opposes the request to reopen. She argues that the operator's motion does not demonstrate an excusable mistake under Rule 60(b). According to the Secretary, the operator's delay from August 7, 2024 (the date of the Show Cause Order) to the filing of its motion to reopen on December 2, 2024 (117 days), is not explained. She also contends that the operator's failure to read and lack of understanding of the Order to Show Cause and Order of Default indicates a failure of its processing system, and that it should have been diligent in its efforts to understand the documents. The Secretary also points out that the operator has failed to respond to MSHA communications twice in two prior similar motions to reopen, in which the operator "failed to receive" issuances from the Mine Safety and Health Administration ("MSHA") and the Commission. The Secretary further argues that Wayne's motion to reopen should be denied due to its failure to provide adequate training to its employee handling contests, despite it having over 30 years of experience in mining operations.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment." *Marfork Coal Co., LLC*, 45 FMSHRC 463, 464 (June 2023); *Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3345 (Nov. 2013) ("We have repeatedly and unequivocally held that a failure to contest a proposed assessment as a result of an inadequate or unreliable internal processing system does not establish grounds for reopening an assessment."). Not only did Wayne not monitor its email adequately, but there appears to have been no process in place to monitor the proceedings before the Commission. The operator failed to timely respond to the Secretary's petition and subsequently failed to respond to the Chief Judge's Order to Show Cause.¹

The Secretary's Petition for Assessment of Civil Penalty clearly explained that Wayne had an obligation to file an answer within 30 days. Furthermore, the Order to Show Cause

¹ We note that Wayne has operated its mine since May 16, 1994. The 30-plus years of the operator's experience weighs against there being an excuse for failing to properly respond to communications from MSHA and the Commission. *See Cooper Stone, LLC*, 46 FMSHRC 808, 809 n.3 (Sept. 2024) ("the operator's apparent ignorance of the proper procedure for contesting a proposed assessment *despite over 30 years of operation* may indicate further inadequacies with the operator's internal processing system.").

clearly explained that the operator had to respond to the order within 30 days or would be in default. “It is an operator’s responsibility to fully read any information provided by the Secretary in connection with a proposed penalty.” *Mike Morgan Indus., LLC*, 46 FMSHRC 863, 865 (Oct. 2024) (citing *Stone Zone*, 41 FMSHRC 272, 275 (June 2019)). That is equally true of Order to Show Cause. *See Las Vegas Paving Corp.*, 44 FMSHRC 249, 250 (Apr. 2022) (“[O]perators should take Show Cause Orders seriously and should adequately explain any delays in responding to such orders.”). The only explanation Wayne gave is that it did not scroll to the bottom of the Order to Show Cause PDF. This is not excusable neglect, in light of the operator’s obligation to “fully read information” and to take show-cause orders seriously. *Mike Morgan Indus.*, 46 FMSHRC at 864-65 (denying a motion to reopen because the operator’s failure to routinely check its spam email folder was not good cause).

Furthermore, we conclude that Wayne failed to provide any methods to improve its internal procedures. The Commission considers whether an operator’s “procedures to prevent, identify and correct such mistakes have been adopted or changed, as appropriate” *Noranda Alumina, LLC*, 39 FMSHRC 441, 443 (Mar. 2017); *see also, e.g., Mammoth Coal Co.*, 45 FMSHRC 149, 149-50 (Mar. 2023) (granting a motion to reopen in part because the operator explained how it changed its processes); *The N.C. Granite Corp.*, 35 FMSHRC 303, 306 (Feb. 2013) (same). An operator’s failure to explain with specificity how it has changed its procedures weighs in favor of denying the motion. *See Morton Salt, Inc.*, 46 FMSHRC 15, 16 (Jan. 2024) (denying a motion to reopen with prejudice partly because “although [the operator] has stated that it will take action to prevent such a reoccurrence in the future, it has not identified the steps it will take”). Wayne did not provide any explanation of how it will timely respond to future communications received from MSHA and the Commission.

Accordingly, we deny Wayne’s motion.



Mary Lu Jordan, Chair



Timothy J. Baker, Commissioner

Commissioner Marvit, concurring:

I write to agree 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, 977 (Dec. 2024) (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.



Moshe Z. Marvit, Commissioner

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