

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

December 14, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2010-407-M
v.	:	A.C. No. 21-00057-188834 X380
	:	
DITTRICH MECHANICAL &	:	
FABRICATION, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY: Duffy, Young, and Nakamura, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 18, 2010, the Commission received from Dittrich Mechanical & Fabrication, Inc. (“Dittrich”) a request to reopen a penalty assessment that may have 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).

Dittrich states that it never received a copy of the two May 12, 2009, citations that are the subject of the proposed penalty assessment at issue, No. 00018834, which was issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) on June 23, 2009. Dittrich attaches a letter dated May 21, 2009, from MSHA informing it of its Contractor Identification Number. It also acknowledges receiving the proposed penalty assessment, but states that a secretary filed the assessment away, which prevented Dittrich from acting upon it. Dittrich also acknowledges receiving a delinquency notice from MSHA.

The Secretary opposes reopening the assessment on the ground that the excuse offered by Dittrich for not responding to the assessment is not sufficiently detailed to justify reopening. The

Secretary also states that Dittrich has failed to explain why it did not respond to the delinquency notice, but instead waited until after MSHA had referred the matter to the U.S. Treasury before it made its request to reopen.

The Secretary does not address Dittrich's argument that it never received the citations that are the subject of the assessment. Section 104(a) of the Mine Act requires that MSHA issue citations to operators (and thus also to contractors) in writing. *See* 30 U.S.C. § 814(a). The Mine Act further provides in section 105(a) for proposed penalty assessments for citations and orders issued pursuant to section 104. *See* 30 U.S.C. § 815(a). We do not condone the operator's handling of the proposed penalty assessment in this instance, especially its failure to act upon receiving an MSHA delinquency notice. However, absent evidence that the citations were ever issued to Dittrich,¹ we cannot find that the assessment was ever effective.

Consequently, we conclude that there is no final order in this case, and we dismiss the operator's request to reopen as moot. MSHA is free to issue another proposed penalty assessment once it has complied with the requirements of section 104(a).

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Patrick K. Nakamura, Commissioner

¹ We note that the Secretary did not submit copies of the citations with her response in opposition, but rather internal MSHA documentation regarding the violations.

Chairman Jordan and Commissioner Cohen, concurring:

Our colleagues conclude that there is no final order in this case and therefore the request to reopen should be dismissed as moot. We disagree, but would grant relief on alternative grounds.

The majority states that, absent evidence that the citations were delivered to the operator, they cannot find the penalty assessment was ever effective. Slip op. at 2. They note that the Secretary submitted internal MSHA documents regarding the violations but did not submit copies of the citations. Our colleagues suggest that MSHA may issue another proposed penalty assessment once it has complied with the requirements of section 104(a) (which mandates that citations be issued in writing), thus finding, based only on the operator's unsubstantiated assertion, that no written citation was ever issued.

The Secretary, who opposed the motion to reopen, submitted a printout (from an MSHA website) with information identical in almost all respects to that found in the paper version of a citation that MSHA traditionally provides to an operator.¹ Thus, by elevating form over substance, our colleagues find that the Secretary failed to offer evidence that the citations were ever issued to Dittrich because, perhaps out of expediency, the versions of the citations that the Secretary provided to the Commission were not photocopies of the paper citations. This despite the fact that the Secretary's submission contains the same substantive information found on a paper citation (for instance, it contains the citation numbers and states that the citations were issued to Richard Dittrich at 11:30 a.m. on May 12, 2009 and terminated on May 12 and May 28). We conclude that the Secretary's submission is sufficient to rebut the operator's contention that no written citation issued.

We believe the majority could be setting an unfortunate precedent. It appears that in the future, if an operator claims to have not received a written citation, the Secretary must submit a photocopy of the original form given to the operator, instead of an electronic version that is slightly reconfigured, in order for the rebuttal evidence to be sufficient for the majority. We do not believe the Secretary must go to such lengths to meet her burden of proof. Additionally, based on the record in this case, we do not believe the Commission should order the Secretary to re-serve the citation before she can issue a penalty assessment.

Consequently, we conclude that there was a final order in this case, as the Secretary offered sufficient proof that she issued a written citation and proposed a penalty, but the operator failed to timely contest it. However, we would grant relief because the operator's reason for failing to respond to the proposed penalty (which was that Dittrich's secretary filed it but did not properly inform the operator), constitutes excusable neglect. *See 46 Sand & Stone, 23 FMSHRC*

¹ The forms submitted by the Secretary (one of which has a website address that includes the term "IssuanceViewForm") may in fact simply be a printout of an electronic version of the same document the majority insists the Secretary submit.

1091-92 (Oct. 2001) (granting request to reopen because the proposed penalty assessment form was misfiled).

Mary Lu Jordan, Chairman

Robert F. Cohen, Jr., Commissioner

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