FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

May 9, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. LAKE 2019-0317-M
	:	A.C. No. 33-04563-261088
v.	:	
WESTFALL AGGREGATE & MATERIALS, INC.	:	

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY: Althen and Rajkovich, Commissioners:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On July 12, 2019, the Commission received from Westfall Aggregate & Materials, Inc. ("Westfall") a request to reopen a penalty assessment pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a), 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. 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)(1) 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, 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"); *Jim Walter Res., Inc*., 15 FMSHRC 782, 786-89 (May 1993).

The operator seeks to reopen a $16,400 special assessment for a single violation allegedly documented in Citation No. 6559330. The operator received the assessment on July 20, 2011. The Secretary claims that the assessment became a final order on August 19, 2011, and that MSHA mailed a delinquency notification on October 6, 2011. The motion to reopen was filed in July 2019, seven years after the alleged final order. The current assessment, after interest, is $33,559.46.

According to the proposed penalty assessment, Citation No. 6559330 was issued to the operator along with Order No. 6559329 on February 28, 2011. However, the operator "draws the Commission['s] attention to the fact that Citation #6559330 as received by Petitioner and as set forth in MSHA files, did not consist of or include a 'Mine Citation/Order.'" MTR at 1-2. Moreover, in contrast to the order, there is no Citation/Order Form for Citation No. 6559330 in the record.

The Secretary opposes the operator's request to reopen. The Secretary contends that the operator's motion to reopen must be denied because it was filed more than a year after the final order.[1] In addition, the Secretary contends that the operator is not entitled to relief because its failure to timely contest the penalty was the result of an inadequate processing system, which resulted in the proposed assessment being placed into the wrong company file, and because the operator has an extensive delinquency history.[2]

The operator allegedly contacted the Secretary twice regarding the assessment. The operator claims that it made an inquiry regarding the $16,400 assessment to Beau Ellis, an attorney for the Secretary, and that it made an inquiry in 2016 to Brian Yesko, a Conference Litigation Representative. The operator alleges that the Department of Labor did not provide any information in response to these queries. An MSHA inspector later contacted the operator in April 2019 regarding the unpaid balance for the assessment. Apparently, this was the first time MSHA, or anyone else, had contacted the operator about the assessment since it allegedly became a final order. The operator filed its request to reopen in July 2019, a few months after being contacted by MSHA.

Under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), MSHA must issue citations to operators in writing. Under section 105(a), MSHA can propose penalty assessments for citations issued pursuant to section 104. In *Dittrich Mechanical and Fabrication, Inc.,* 32 FMSHRC 1599, 1600 (Dec. 2010), the Commission cited these provisions to hold that if an operator claims not to have received a written citation, *i.e.,* the appropriate Citation/Order Form, the Secretary must provide evidence that such a citation had been issued. And if the Secretary fails to provide such evidence, the Commission "cannot find that the assessment was ever effective." *Dittrich,* 32 FMSHRC at 1600.

In *Dittrich,* the operator claimed not to have received a written citation, and the Secretary failed to provide evidence of a written citation. Although the Secretary provided "internal MSHA documentation" suggesting that a citation had been issued, the Commission held that this

[1] Rule 60(c) of the Federal Rules of Civil Procedure provides that a Rule 60(b) motion must be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. Fed. R. Civ. P. 60(c).

[2] The operator does concede that it incorrectly placed the penalty assessment for violation No. 6559330 in its closed file for Order No. 6559329. The operator states that this occurred because the assessment paperwork received by the operator did not include an actual citation, therefore the matter was not flagged as an active citation requiring attention. The assessment provided as an exhibit by the operator includes the standard cover letter and narrative findings (which reference the citation), but not the citation form itself. Mot. at 2; Ex. A.

was not sufficient to infer the issuance of a written citation. *Id.* at n.1. Therefore, the Commission found that the assessment in *Dittrich* never became effective, and consequently never became a final order. However, the Commission did not foreclose MSHA from correcting its error by issuing a written citation in the future. *Id*.

Similar to *Dittrich*, the operator here claims not to have received a written citation for the assessment, and the Secretary failed to provide sufficient evidence of a citation. The only document in the record which might support the issuance of a written citation is an internal MSHA document, MSHA's special assessment for violation No. 6559330. Although the special assessment contained information for violation No. 6559330 such as the alleged level of negligence, such internal MSHA documentation is insufficient to infer the issuance of a written citation. *See* MTR, Ex. A. at 5.

Under *Dittrich,* 32 FMSHRC at 1600, the proposed assessment for the violation in this case is not effective. Therefore, we cannot find that the assessment for violation No. 6559330 ever became a final Commission order.

Consequently, we conclude that there is no final order in this case, and we dismiss the operator's request to reopen as moot. [3] MSHA may issue another proposed penalty assessment once it has complied with the requirements of section 104(a).[4]

William I. Althen, Commissioner

Marco M. Rajkovich, Jr., Commissioner

[3] Similarly, the Commission has routinely found it appropriate to dismiss motions to reopen as moot where there was no final order because the operator did not receive the proposed assessment. *E.g.*, *Double Bonus Coal Co.*, 31 FMSHRC 358 (Mar. 2009); *Cumberland Coal Res.*, 38 FMSHRC 2502 (Oct. 2016); *Delhur Indus., Inc.*, 43 FMSHRC 396 (Aug. 2021).

[4] We note that the alleged violation is more than a decade old. We express no opinion on how this long passage of time might affect a proceeding, if the Secretary chooses to wake the violation from its sleep.

Chair Traynor, dissenting,

Westfall Aggregate & Materials, Inc., filed its motion to reopen Citation No. 6559330 and the associated civil penalty almost *eight years* after it became a final order of the Commission. Rule 60(c) of the Federal Rules of Civil Procedure provides that a motion to reopen shall be filed not more than one year after the judgment was entered.[1] Westfall's motion was filed well out of time and thus should be denied. *See, e.g.*, *Wayne J. Sand & Gravel Inc.*, 43 FMSHRC 386, 387 (Aug. 2021) (denying a motion filed more than 16 months after the issuance of a default order as untimely filed). My colleagues tacitly acknowledge that the motion to reopen is time-barred, as they do not consider any of the operator's arguments for relief pursuant to Rule 60(b), i.e., mistake, inadvertence or excusable neglect. Instead, my colleagues conduct an alternative analysis for relief *de novo*, from which I dissent.

The majority finds that the Mine Safety and Health Administration ("MSHA") failed to issue Citation No. 6559330 in writing to Westfall as required by section 104(a) of the Mine Act, 30 U.S.C. § 814(a) (requiring that "each citation shall be in writing"). But this finding is very clearly wrong.

My colleagues' analysis contains multiple errors. First and foremost, Westfall never argues in its motion that the Secretary failed to issue a citation as required by section 104(a) of the Mine Act. Second, my colleagues do not establish that the Commission has jurisdiction to consider such a claim, had it been presented. Finally, Westfall unambiguously concedes that it received a copy of Citation No. 6559330 in writing, *attaching it as an Exhibit to its pleadings*.

A. Westfall does not claim that MSHA failed to issue the citation in writing.

Westfall does not claim that MSHA failed to issue Citation No. 6559330 in writing and did not raise non-issuance in its motion.[2] Westfall's actual argument as articulated in its motion is more nuanced. Westfall states that MSHA's issuance of the written citation in an atypical form confused its staff and contributed to their failure to timely file contest of the penalty. Mot. at 4. Specifically, Westfall argues that MSHA's decision to issue a specially assessed penalty rather than to regularly assess the civil penalty and the absence of a standard MSHA Citation/Order contributed to the confusion.[3] *Id*. Westfall further avers that its inexperience with special assessments "resulted in inadvertent and mistaken interpretation and treatment" of

[1] "The Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure." 29 C.F.R. § 2700.1(b).

[2] Accordingly, the Secretary did not have notice that the issue was before the Commission.

[3] Westfall claims *inter alia* that the five-month gap in time between the issuance of the associated Order No. 6559329 and the specially assessed penalty for the subject citation also contributed to its confusion and mistake. Mot. at 4.

the citation, which would justify reopening the penalty pursuant to Rule 60(b).[4] *Id*. at 5. My colleagues inappropriately transform this Rule 60(b) argument into a claim that MSHA failed to issue the citation "in writing" as required by section 104(a) of the Mine Act.

Again, Westfall does not argue that *the form of the citation* it received with the penalty assessment failed to comply with the requirements of section 104(a) of the Mine Act.

B. The Commission does not have jurisdiction to issue the majority decision.

The majority asserts that it has jurisdiction to consider this matter pursuant to the Commission's jurisdiction to reopen final orders. Slip op. at 1 (*citing* Federal Rule of Civil Procedure 60(b)); *see Monterey Coal Co*., 15 FMSHRC 997 (June 1993) ("we hold that the Commission possesses jurisdiction to reopen final orders"). Yet, their conclusion that "there is no final order in this case" appears to contradict their initial assertion that the Commission possesses jurisdiction in this matter to consider a motion to reopen a final order. Slip op. at 3. My colleagues do not explain this apparent discrepancy.[5]

As an administrative agency created by statute, the Commission cannot exceed the jurisdictional authority granted to it by Congress. *Kaiser Coal Corp*., 10 FMSHRC 1165, 1169 (Sept. 1988); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472-73 (1977); *Civil Aeronautics Bd. v. Delta Airlines*, 367 U.S. 316, 322 (1961). Specific provisions of the Mine Act delineate the scope of the Commission's jurisdiction and it does not possess plenary authority to review all enforcement actions. *Pocahontas Coal Co*., 38 FMSHRC 176, 181 (Feb. 2016).

C. Westfall concedes that it received the citation in writing.

The majority ultimately concludes that because Westfall did not receive Citation No. 6559330 "in writing" as required by section 104(a) of the Mine Act, 30 U.S.C. § 814(a), it is not a final order of the Commission. The majority relies on *Dittrich Mechanical & Fabrication, Inc.*, 32 FMSHRC 1599, 1600 (Dec. 2010), in which the Commission held that absent evidence that the citations were ever issued to Dittrich, there was no final order.[6]

The case at hand is readily distinguishable from *Dittrich*. Westfall *concedes that it received a citation in writing from MSHA*, attaching a copy of the citation as Exhibit A to the instant Motion filed with the Commission. Mot. at 1 ("A copy of Citation No. 6559330 is attached hereto as Exhibit A"); Mot. at 3 ("Citation [No.] 6559330 was received approximately five (5) months after [Order No.] 6559329"). Additionally, the record also contains a copy of Order No. 6559329 which states that "Citation No. 6559330 is being issued in conjunction with

[4] MSHA's regular and specially assessed penalty proposal regulations are available at 29 C.F.R. Part 100. According to 29 C.F.R. § 100.5, "MSHA may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment" and may issue a penalty in an alternative narrative form.

[5] Furthermore, the motion to reopen was filed well beyond Rule 60(c)'s one year limit.

[6] The Commission did not explain its jurisdictional authority in *Dittrich* either; however, the subject motion to reopen in that case was not filed out of time.

this order." Westfall Ex. B. The order and citation were issued after an MSHA inspector observed a crane operating at the mine without service brakes. *Id*.; Westfall Ex. A[7].

Furthermore, this proceeding, unlike *Dittrich*, involves the issuance of a specially assessed penalty. Typically, the Secretary of Labor proposes civil penalties pursuant to his regulations at 30 C.F.R. § 100.3. If the Secretary determines that conditions warrant a specially assessed penalty, he may waive the regular assessment process. 30 C.F.R. § 100.5(b). For special assessments, "[a]ll findings shall be in narrative form." 30 C.F.R. § 100.5(b). The Secretary's narrative findings for the citation and special assessment received by Westfall in this proceeding contain all the information that MSHA is required to provide according to section 104(a), 30 U.S.C. 814(a), of the Mine Act ("Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated."). For example, the document alleges, in part, that: Westfall violated the mandatory safety standard at 30 C.F.R. 56.14101(a)(1), the Secretary believes that Westfall exhibited a moderate degree of negligence, and the gravity of the violation was serious. Thus, the record demonstrates that the Secretary's section 104(a) obligations were fully satisfied.

In *Dittrich*, the only evidence that a citation had been issued was a print-out from MSHA's website. 32 FMSHRC at 1601. The Commission found that "internal MSHA documentation regarding the violations" does not evidence that the citations were issued to the operator. *Dittrich,* 32 FMSHRC at 1600, 1600 n.1. Here, of course, the operator concedes that it was issued the narrative findings for a specially assessed penalty. Westfall Ex. A at 5. My

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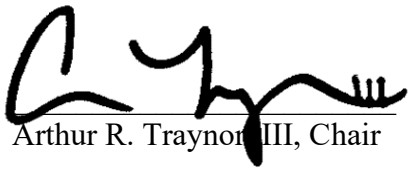
[7] Citation No. 6559330 attached to Westfall's instant Motion as *Exhibit A* states in pertinent part:

> On February 28, 2011, MSHA issued Section 104(a) Citation 6559330 at the Hill Road Pit. Westfall Aggregate & Materials, Incorporated, was cited for a violation of 30 CFR 56.14101(a)(1).
>
> This citation was issued in conjunction with 107(a) Imminent Danger Withdrawal Order 6559229 dated February 28, 2011.
>
> The gravity of the violation was considered serious.
>
> The violation resulted from the operator's moderate degree of negligence.
>
> The number of previously assessed violations and inspection days at this mine, and the size of the mine and company appear on the attached Proposed Assessment.
>
> Based on the six criteria set forth in 30 CFR 100.3(a) and the information available to the Office of Assessments, it is proposed that Westfall Aggregate & Materials, Incorporated, be assessed a civil penalty of $16,400.

Westfall Ex. A (issued July 14, 2011).

colleagues wrongly assert that the special assessment is "an internal MSHA document." Slip op. at 3. The record reflects not only that the document was issued to Westfall as required by 30 C.F.R. § 100.5, but also that it was received and signed for by Westfall. Westfall Ex. A; Sec'y Ex. A.

Accordingly, the record establishes that a citation was validly issued pursuant to section 104(a) of the Mine Act, there is a final order, and the motion to reopen was filed out of time. Thus, I dissent.



Arthur R. Traynor, III, Chair

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