

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 26, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2011-240-M
v.	:	A.C. No. 40-02210-234371 A
	:	
MICHAEL R. TAYLOR	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On January 7, 2011, the Commission received from Michael R. Taylor (“Taylor”) a motion by counsel seeking to reopen a penalty assessment against Taylor under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), 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 the Commission’s Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

In his motion, Taylor states that he did not receive MSHA’s proposed penalty assessment, which was sent in October 2010. Taylor explains that during the special investigation, he provided the MSHA investigator both his work and home addresses. Taylor asserts the proposed assessment was sent via certified mail to a different address and was returned undelivered to MSHA. He contends that he discovered the penalty assessed against him on December 8, 2010, when a representative of the Secretary contacted his counsel. He asserts that the assessment was final when he received it and thus filed this request to reopen.

The Secretary states that she does not oppose Taylor’s request to reopen the penalty assessment.

Here, Taylor never received notification of the proposed penalty assessment as required under Commission Rule 25.<sup>1</sup> Under the circumstances of this case, we conclude that Taylor was not notified of the penalty assessment within the meaning of the Commission's Procedural Rules, until at least December 8, 2010, when his counsel was notified of the assessment from MSHA. Under the circumstances of this case, we conclude that Taylor timely contested the proposed penalty, once he had actual notice of the proposed assessment. *See John R. Hurley*, 31 FMSHRC 1331, 1332 (Dec. 2009) (concluding that the proposed assessment was not final because the agent did not properly receive the proposed assessment and construing the agents' submission as a timely contest); *Michael Cline*, 31 FMSHRC 354, 355-56 (Mar. 2009) (same); *Stech, employed by Eighty-Four Mining Co.*, 27 FMSHRC 891, 892 (Dec. 2005) (same).

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<sup>1</sup> Commission Procedural Rule 25 states that the "Secretary, by certified mail, shall notify the operator or *any other person against whom a penalty is proposed* of the violation alleged, the amount of the proposed penalty assessment, and that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty assessment." 29 C.F.R. § 2700.25 (emphasis added).

Accordingly, the proposed penalty assessment is not a final order of the Commission. We remand this matter to the Chief Administrative Law Judge for assignment to a judge. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

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