

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

May 27, 2009

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

RANDY PACK

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Docket No. KENT 2009-517
A.C. No. 15-17110-159591 A

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners¹

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 9, 2009, the Commission received a motion by counsel seeking to reopen a penalty assessment against Randy Pack 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.

On August 7, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) apparently issued Proposed Assessment No. 00159591A to Pack relating to Citation No. 6648616, which had been issued on September 14, 2007. Pack states that, since a conference on the citation in February 2008, neither he nor his counsel received any correspondence regarding the citation or a related proposed penalty assessment. Pack further states that they were unaware that a civil penalty had been proposed until he received a notice of delinquency from MSHA, dated November 14, 2008. In a letter dated February 3, 2009, the

¹ Commissioner Cohen did not participate in this matter.

Secretary states that she does not oppose reopening the proposed penalty assessment. The Secretary served her response on Pack's counsel and attached a copy of the proposed assessment.

Here, Pack never received notification of the proposed penalty assessment as required under Commission Procedural Rule 25.² Under the circumstances of this case, we conclude that Pack was not notified of the penalty assessment, within the meaning of the Commission's Procedural Rules, until sometime after February 3, 2009, when he received a copy of the assessment form from MSHA. Pack, through his attorney, notified MSHA of his intent to contest the proposed penalty assessment by his motion to reopen. We conclude that Pack has timely notified the Secretary that he wished to contest the proposed penalty, once he had actual notice of the proposed assessment. *See Cline*, 31 FMSHRC 354, 355 (Mar. 2009).

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.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

² 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. Here, the Secretary was required to send the penalty proposal at issue to Pack at his home address or "in care of" counsel at counsel's address.

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