

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

September 22, 2009

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

v.

WAYNE RAY, employed by  
OAK GROVE RESOURCES

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Docket No. SE 2009-171  
A.C. No. 01-00851-161298 A

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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 December 12, 2008, the Commission received from Wayne Ray a motion by counsel in which Mr. Ray seeks to reopen a penalty assessment under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had allegedly 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 27, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 00161298A. Mr. Ray states that he did not learn of the proposed assessment until his counsel received a delinquency notice dated November 28, 2008, indicating that the assessment had become a final order of the Commission. The Secretary confirms that the proposed assessment was never received by Mr. Ray and was returned to MSHA because delivery was refused by the law firm representing him. The Secretary submits that the assessment was addressed solely to Mr. Ray at the street address of the law firm and that delivery was refused “because the address did not indicate that the assessment was meant to be delivered to the law firm or to Mr. Ray’s attorney.”

Having reviewed Mr. Ray's request and the Secretary's response, we find the request to reopen to be moot because Mr. Ray never properly received the assessment and the proposed assessment has not become a final order of the Commission.<sup>1</sup> Since Mr. Ray is now aware of the proposed penalty assessment, he has 30 days from the date of this order to either contest or pay the proposed penalty. If the proposed penalty is timely contested by Mr. Ray, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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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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<sup>1</sup> The Commission has previously stated that, in a section 110(c) proceeding, MSHA should send the proposed assessment to the individual at his home address or "in care of" counsel at counsel's address. *E.g., Stech, employed by Eighty-Four Mining Co.*, 27 FMSHRC 891, 892, n.1 (Dec. 2005).

Distribution:

F. Thomas Rubenstein, Esq.  
Dinsmore & Shohl, LLP  
215 Don Knotts Blvd., Suite 310  
Morgantown, WV 26501

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
1100 Wilson Blvd., Room 2220  
Arlington, VA 22209-2296

Myra James, Chief  
Office of Civil Penalty Compliance, MSHA  
U.S. Dept. Of Labor  
1100 Wilson Blvd., 25<sup>th</sup> Floor  
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001-2021