

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 9, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2011-146-M
v.	:	A.C. No. 09-01038-226939 A
	:	
ROBERT COLEMAN, Employed by	:	
CARMEUSE LIME AND STONE	:	

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 December 6, 2010, the Commission received from Robert Coleman (“Coleman”) a motion requesting that the Commission reopen a penalty assessment against Coleman under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On January 4, 2011, the Commission received a letter from the Secretary of Labor (“Secretary”) stating that she did not oppose the motion to reopen.

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 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.

Order No. 6505780 was issued by the Mine Safety and Health Administration (“MSHA”) on June 16, 2009, to Carmeuse Lime and Stone (“Carmeuse”). On August 2, 2010, the MSHA issued Proposed Assessment No. 00226939A to Coleman, alleging that he was personally liable, pursuant to section 110(c) of the Mine Act, for the violation alleged in Order No. 6505780. The proposed assessment was apparently delivered to the Marble Hill Mine on August 5, 2010. According to Coleman, it was signed for by a “W. Weaver,” whom he identifies as William Weaver, an hourly employee of Carmeuse. William Weaver states in an affidavit that he has no

recollection of receiving the proposed assessment. Weaver further states, that even if he did receive the assessment, he does not recall “personally hand deliver[ing] it to Robert Coleman.”

In his motion to reopen, Coleman asserts that he did not timely contest the proposed penalty because he did not receive the proposed assessment.¹ Coleman states that he first learned that a penalty had been issued to him for the order on November 1, 2010, after receiving a delinquency notice from MSHA. Coleman requests that the proceeding be reopened so that the penalty case can move forward.

Commission Procedural Rule 25 provides, in pertinent part, that the Secretary “shall notify . . . any other person against whom a penalty is proposed of the violation alleged.” 29 C.F.R. § 2700.25. Accordingly, a proposed assessment under section 110(c) does not become a final order within 30 days, if the manner in which the proposed penalty was delivered to the individual does not provide him or her with actual notice of the proposed assessment. *See Stech, employed by Eighty-Four Mining Co.*, 27 FMSHRC 891 (Dec. 2005) (finding that a proposed assessment does not become a final order when it was mistakenly delivered to a separate firm in counsel’s office building, and addressed to the respondent himself rather than “in care of” his counsel). In *Stech*, the Commission advised that “[i]f the Secretary had sent the penalty proposal at issue here to [the respondent] at his home address or ‘in care of’ counsel at the counsel’s address, the confusion would presumably have been avoided.” 27 FMSHRC at 892 n.1.

¹ In his affidavit Coleman mistakenly states that Case No. 00226939A involves a penalty issued for Order No. 6505870, when in fact it involves a penalty issued for Order No. 6505780.

We conclude that Coleman was not provided with notice, as required by Procedural Rule 25. Accordingly, Proposed Assessment No. 00226939A 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.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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