

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

December 10, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2010-7
v.	:	A.C. No. 44-06685-182175 A
	:	
JOHN R. HURLEY	:	

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 October 5, 2009, the Commission received a motion by counsel seeking to reopen a penalty assessment against John R. Hurley 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 April 14, 2009, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 00182175 A to Hurley relating to Citation No. 6629283, which had been issued on December 19, 2007. The record indicates that MSHA sought to deliver the assessment by Federal Express, but Hurley never received the assessment, despite his efforts to do so. Soon after Hurley received a delinquency notice from MSHA regarding the assessment, his counsel made arrangements to obtain a copy of the assessment from MSHA and immediately filed a notice of contest. The Secretary of Labor does not oppose reopening in this instance.

The record indicates that Hurley never received proper notification of the proposed penalty assessment as required under Commission Procedural Rule 25.¹ Under the circumstances of this case, we conclude that Hurley timely notified the Secretary that he wished to contest the proposed penalty once he had such notice.

Because the proposed penalty assessment did not become not a final order of the Commission, we will treat the motion to reopen as moot. 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.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

¹ 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.

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