

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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March 11, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2010-1486-M
v.	:	A.C. No. 45-00359-201499 A
	:	
DARRELL LAMBERT, Employed by	:	
LVI ENVIRONMENTAL, INC.	:	

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 July 8, 2010, the Commission received from Darrell Lambert (“Lambert”) a motion by counsel seeking to reopen a penalty assessment against Lambert 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, Lambert states that he did not receive MSHA’s proposed penalty assessment, which was sent in October 2009 via Federal Express to the company’s Seattle, Washington address. Lambert explains that he was laid off from his position in February 2009, that the company closed its Seattle office in April 2009, and that Lambert relocated to a new position within the company in New Jersey in July 2009. Lambert states that he informed the U.S. Postal Service of his change of address and had his mail forwarded. He asserts that he discovered the penalty assessed against him on or around June 25, 2010, when he received a letter forwarded by the U.S. Postal Service from the U.S. Department of Treasury informing him of the delinquency. Lambert further states that his counsel obtained a copy of the proposed

assessment from MSHA on June 30, 2010 and shortly filed this request to reopen. Lambert asserts that he wishes to contest the penalties proposed against him.

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

Here, Lambert 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 Lambert was not notified of the penalty assessment, within the meaning of the Commission's Procedural Rules, until at least June 25, 2010, when he received a copy of the assessment from MSHA. Under the circumstances of this case, we conclude that Lambert timely contested the proposed penalty, once he had actual notice of the proposed assessment. *See John R. Hurley*, 31 FMSHRC 1331, 1332 (Dec. 2009); *Michael Cline*, 31 FMSHRC 354, 355-56 (Mar. 2009); *Stech, employed by Eighty-Four Mining Co.*, 27 FMSHRC 891, 892 (Dec. 2005) (all 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).

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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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