

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 16, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2005-183-M
v.	:	A.C. No. 38-00130-33784 A
	:	
TERRY THOMPSON, employed by	:	
FOSTER DIXIANA CORPORATION	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, 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. (2000) (“Mine Act”). On March 10, 2005, the Commission received from Terry Thompson a motion made by counsel to reopen a penalty assessment for a violation of 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 section 105(a) of the Mine Act and the Commission’s Procedural Rules, an individual charged with a violation under section 110(c) has 30 days following receipt of the Secretary of Labor’s proposed penalty assessment within which to notify the Secretary that he or she wishes to contest the proposed penalty. 30 U.S.C. § 815(a); 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. 30 U.S.C. § 815(a); 29 C.F.R. § 2700.27.

Terry Thompson is the Plant Manager at the Dixiana Mine in Columbia, South Carolina, owned by Foster Dixiana Corporation (“Foster Dixiana”). On May 12, 2003, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued to Foster Dixiana an order and citation alleging violations of mandatory health and safety standards. Mot. at 1. On August 6, 2004, MSHA mailed a proposed penalty assessment to Thompson alleging that he was liable for the May 12, 2003 order and citation under section 110(c) of the Mine Act. *Id.* at 2. Thompson

states that the proposed assessment against him was sent to the wrong address and that he did not receive it before the time to contest it had elapsed. *Id.* and Decl. of Terry Thompson at ¶¶ 7-10. Counsel for Thompson only learned of the Secretary's section 110(c) allegations against Thompson on February 11, 2005 in the course of inquiring as to whether MSHA would be filing any charges against him, and did not receive a copy of the assessment until February 28, 2005. Mot. at 2. Thompson also asserts that had he received the penalty proposal in a timely fashion, he would have contested it. Decl. at ¶ 11.

Counsel further states that related proceedings involving the charges against Foster Dixiana and a co-worker of Thompson are currently pending before Administrative Law Judge Gary Melick. Mot. at 3. Counsel has moved for a continuance of the hearing in the proceedings before Judge Melick scheduled for April 5, 2005. *Id.* The Secretary states that she does not oppose Thompson's request for relief.

Here, the proposed penalty assessment was mailed to an address at which Thompson no longer received mail. Thompson was not required to notify MSHA of his change of address under 30 C.F.R. § 41.12. Thompson received a copy of the proposed penalty assessment on February 28, 2005 through counsel. Under these circumstances, we conclude that Thompson did not "receive" the penalty assessment within the meaning of section 105(a) of the Mine Act and the Commission's Procedural Rules until February 28, 2005. *Roger Richardson*, 20 FMSHRC 1259, 1260 (Nov. 1998). In his motion to reopen this matter, filed with the Commission on March 10, 2005 (well within the 30-day time period) and served upon the Secretary, Thompson clearly states his intent to contest the proposed penalty assessment against him. We conclude from this that Thompson timely notified the Secretary that he contests the proposed penalty. *Id.*

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.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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