

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001

December 26, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2008-249
	:	A.C. No. 46-08436-122939 A
v.	:	
	:	
BENNY PRESLEY	:	

BEFORE: Duffy, Chairman; Jordan 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 November 21, 2007, the Commission received from Benny Presley (“Presley”) a motion seeking to reopen a penalty assessment against Presley 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.

The Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued several orders at the Upper Big Branch Mine, which is operated by Performance Coal Company (“Performance”). In his motion, Presley states that he was a foreman at Performance and was questioned during a special investigation, pursuant to section 110(c) of the Mine Act, 30 U.S.C. § 820(c). Sometime after the investigation, MSHA issued an assessment, A.C. No. 46-08436-122939 A, to Presley. However, Presley states that he moved to a new address after the investigation and never received the proposed assessment. His motion further states that on October 26, 2007, he received a delinquency letter from the Department of Labor, and he learned

of the penalty. On November 21, Presley filed this motion and notified the Secretary of his desire to contest the penalty assessment. The Secretary states that she does not oppose the motion to reopen the assessment.

The record before us indicates that Presley moved his residence, and that the proposed assessment was apparently sent to the wrong address. Consequently, we conclude that Presley was never notified of the penalty assessment, within the meaning of the Commission's Procedural Rules, until at least October 26, 2007, the date of the delinquency letter from the Secretary. In his motion to the Commission, filed with the Commission on November 21, Presley clearly states his intent to contest the proposed penalty assessment against him. We conclude from this that Presley timely notified the Secretary that he wished to contest the proposed penalty, once he had actual notice of the proposed assessment. *See Stech, emp. by Eighty-Four Mining Co.*, 27 FMSHRC 891, 892 (Dec. 2005).

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

Michael G. Young, Commissioner

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