FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 18, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. YORK 2009-25-M
	:	A.C. No. 30-00025-151256 A
v.	:	
	:	
MICHAEL CLINE	:	

BEFORE: Duffy, Chairman; Jordan, 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 November 6, 2008, the Commission received from Michael Cline ("Cline") a motion by counsel seeking to reopen a penalty assessment against Cline 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, Cline states that in January 2008, he was informed, through counsel, that the Department of Labor's Mine Safety and Health Administration ("MSHA") intended to assess a civil penalty against him as a result of an alleged "knowing" violation of the same standard referenced in the citation issued to his employer, Orica USA, Inc. ("Orica"), on June 4, 2007. Cline also states that, in January 2008, he was transferred from Orica's New York office to one of its offices in Texas. On May 20, 2008, MSHA apparently issued a proposed penalty assessment to Cline, alleging that he was personally liable under section 110(c) of the Mine Act for a citation issued to Orica. *See* 30 U.S.C. § 820(c). In his motion, Cline asserts that, on September 5, 2008, he received a delinquency letter from MSHA that had been forwarded to him in Texas from Orica's New York office. According to Cline, that letter was the first indication to

him that MSHA had proposed a civil penalty against him. The motion further states that neither Cline nor the attorney representing him had ever received the proposed penalty assessment prior to that time. On September 11, 2008, MSHA faxed Cline's counsel a copy of the proposed assessment. On September 18, Cline's counsel notified MSHA by letter that Cline wished to contest the penalty. The Secretary states that she does not oppose Cline's request to reopen the penalty assessment.

Here, Cline never received notification of the proposed penalty assessment as required under Commission Rule 25.[1] Under the circumstances of this case, we conclude that Cline was not notified of the penalty assessment, within the meaning of the Commission's Procedural Rules, until at least September 11, 2008, when he received a copy of the assessment from MSHA. Cline, through his attorney, notified MSHA of his intent to contest the proposed penalty assessment against him by letter dated September 18, 2008. We conclude from this that Cline timely notified the Secretary that he wished to contest the proposed penalty, once he had actual notice of the proposed assessment. *See Stech, employed by Eighty-Four Mining Co.*, 27 FMSHRC 891, 892 (Dec. 2005).

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[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 (emphasis added). Here, the Secretary was required to send the penalty proposal at issue here to Cline at his home address or "in care of" counsel at counsel's address.

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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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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