

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

May 8, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-754-M
	:	A.C. No. 50-01642-136446
v.	:	
	:	
TECK-POGO, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners¹

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 31, 2008, the Commission received from Teck-Pogo, Inc. (“Teck-Pogo”) a motion by counsel seeking to reopen a penalty assessment 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 section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

On January 24, 2008, Teck-Pogo received a proposed assessment from the Department of Labor’s Mine Safety and Health Administration (“MSHA”) as a result of 56 violations. According to Teck-Pogo, on February 25, it mailed a contest of the assessment to MSHA, which received it on February 29. Teck-Pogo further states that the MSHA’s Office of Assessments

¹ Commissioner Robert F. Cohen, Jr., assumed office after this case had been filed. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Cohen has elected not to participate in this matter.

treated the contest as untimely filed. In response to Teck-Pogo, the Secretary now states that the proposed assessment was timely contested. The Secretary further states that, because she will process the case as timely contested, the Commission should dismiss the request to reopen as moot.

Having reviewed Teck-Pogo's request and the Secretary's response, we conclude that the proposed assessment at issue has not become a final order of the Commission because Teck-Pogo timely contested it. We deny Teck-Pogo's motion as moot and remand this matter to the Chief Administrative Law Judge for further proceedings as appropriate pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. *See Lehigh Cement Co.*, 28 FMSHRC 440, 441 (July 2006).

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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