FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 21, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2005-124-M
v.	:	A.C. No. 30-00082-47411 A
	:	
MATTHEW J. RIZZUTO, employed by	:	
TILCON NEW YORK, INC.	:	

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 June 23, 2005, the Commission received from Matthew J. Rizzuto 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 apparently 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.

On January 5, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") mailed a proposed penalty assessment to Rizzuto alleging that he was personally liable under section 110(c) of the Mine Act for a citation (No. 6017456) issued to his employer, Tilcon New York, Inc. Mot. at 1-2. Rizzuto 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*. at 2. Counsel for Rizzuto only learned of the Secretary's section 110(c) allegations against

Rizzuto on June 22, 2005 when counsel for the Secretary informed her of difficulties MSHA had encountered in serving papers on Rizzuto. *Id*. Rizzuto also asserts that he had every intention of contesting any proposed section 110(c) penalties against him. *Id*. at 2-3. The Secretary does not oppose Rizzuto's request for relief.

Here, the proposed penalty assessment was mailed to a nonexistent address. The agency had in fact previously sent mail to Rizzuto at his proper address. Mot. at Ex. B. Under these circumstances, we conclude that Rizzuto did not "receive" the penalty assessment, within the meaning of section 105(a) of the Mine Act and the Commission's Procedural Rules, until at least June 22, 2005. *See Roger Richardson*, 20 FMSHRC 1259, 1260 (Nov. 1998). In his motion to reopen this matter, filed with the Commission on June 23, 2005, Rizzuto clearly states his intent to contest the proposed penalty assessment against him. We conclude from this that Rizzuto 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.

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

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