The July 2005 issue of the Commission decisions is being reprinted because of a publication error.
No cases were filed in which Review was granted during the month of July.

No cases were filed in which Review was denied during the month of July.
COMMISSION ORDERS
ORDER

On June 29, 2005, the Secretary of Labor filed a motion to dismiss this appeal as moot because the Secretary has vacated the citation that formed the basis for this case. Upon consideration of the Secretary's motion to dismiss, we hereby grant the motion. The direction for review in this case is vacated.

Michael F. Duffy, Chairman
Mary Lu Jordan, Commissioner
Stanley C. Suboleski, Commissioner
Michael G. Young, Commissioner
Distribution

Robin A. Rosenbluth, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

Ronald L. Massey, Safety Director
Wake Stone Corporation
P.O. Box 190
Knightdale, NC 27545

Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

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.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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Distribution

Margaret S. Lopez, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
2400 N Street, N. W., Fifth Floor
Washington, D. C. 20037

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety and Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D. C. 20001
ADMINISTRATIVE LAW JUDGE DECISIONS
This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). The case was remanded by the Commission on May 16, 2005, for further proceedings. Petitioner has now filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty to $25.00, is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $25.00, within 40 days of this order.
Distribution: (First Class Mail)

Dane L. Steffenson, Esq., Office of the Solicitor, U.S. Dept. of Labor, 61 Forsyth Street, S.W., Room 7T10, Atlanta, GA 30303

Anthony Jeselnik, Esq., U.S. Steel Tower, Fifteenth Floor, 600 Grant Street, Pittsburgh, PA 15219

/lh
July 14, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),

Petitioner

v.

CURRITUCK SAND INC., Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2004-154-M

A. C. No. 31-02188-22481

Bluebird #1

DECISION APPROVING SETTLEMENT

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty to $1,100.00, is proposed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $1,100.00, within 40 days of this order.


Gary Melick
Administrative Law Judge

Distribution: (First Class Mail)


Leslie Paul Brody, Esq., Office of the Solicitor, U.S. Dept. of Labor, 61 Forsyth Street, S.W., Room 7T10, Atlanta, GA 30303

Adele L. Abrams, Esq., Law Office of Adele L. Abrams, P.C., 4740 Corridor Place, Suite D, Beltsville, MD 20705

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