

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6th FLOOR
WASHINGTON, D.C. 20006

June 27, 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 80-223-M
Petitioner	:	A. C. No. 20-741-5005
v.	:	
J. P. BURROUGHS & SON, INC.,	:	Holly Sand and Gravel Plant
Respondent	:	

ORDER OF DISMISSAL

Four section 104(a) citations were issued to Respondent on September 13, 1979. On January 10, 1980, Respondent received a proposed assessment. In the meantime, a conference was held on January 7, 1980, in which penalty reductions were negotiated. Respondent states that it was told by MSHA personnel to ignore the January 10 assessment notice and await a second proposed assessment based on the reductions negotiated at the conference. On January 14, 1980, the second proposed assessment was received by Respondent. Respondent checked the notice of contest form (the "blue card") and mailed it back to MSHA on February 13, 1980. It was received by MSHA on February 15, 1980.

By corrected order issued April 30, 1980, I granted Petitioner's motion to dismiss Respondent's notice of contest. ^{1/} Respondent sought Commission review, and the Commission remanded the case to consider Respondent's opposition to the motion. I have now considered the affidavit and brief filed by Respondent and the documents previously filed by Petitioner and I conclude that the notice of contest must be dismissed as untimely.

For the purpose of ruling on the motion, I assume that the 30-day period began to run when Respondent received the second proposed assessment, that is, on January 14, 1980. Section 105(a) of the Act requires the operator to "notify" the Secretary that he wishes to contest the proposed assessment within 30 days from the receipt of the Secretary's proposal. I construe this to mean that the Secretary must receive the notice of contest within the 30-day period.

The meaning of "notify" is not specified in the text of the Act, nor in the regulations dealing with notice of contest, 30 CFR § 100.6(b). Section 10(a) of the Occupational Safety and Health Act, 29 U.S.C. §659(a), is parallel to section 105(a). The word "notify" in that section has been construed by the Secretary of Labor to mean that the date

^{1/} The motion was framed as a motion to dismiss Petitioner's own petition for assessment of civil penalty, but I treated it as a motion to dismiss the notice of contest.

notice of contest is mailed controls. 29 CFR § 1903.17; Secretary of Labor v. J.D. Blum Construction Co., 4 OSHC (BNA) 1255 (1976). It is significant that **the Secretary** did not place the same interpretation on "notify" in regulations promulgated under the 1977 Act. The difference may be attributed to the fact that an employer has 15 working days to give notice of contest under **OSHA** instead of 30 calendar days. Departure from the ordinary meaning of the word "notify" was thought justified by the rigors of complying with such a short notice of contest period.

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It is the ordinary meaning of the word "notify" which convinces me that notice of contest was untimely in this case. To notify one of a fact is to make it known to him. Black's Law Dictionary, (5th ed. 1979): 66 C.J.S. Notify § 23. And when a statute requires notice to be given, it is the general rule of law that actual personal notice is required. 58 Am. Jur. 2d Notice § 22.

The time for filing charges under Title VII of the Civil Rights Act of 1964 begins to run when the affected employee is notified of EEOC's dismissal. In construing this language, a District Court said:

While legally Congress might have made the mailing, for example, of the notice of EEOC's dismissal the time of initiation of the **90-day** period during which the employee could sue and cut off such opportunity at the end thereof, it did not do so. The employee must be notified; the notice must be given to him or her. There is **nothing** in the legislative history of the statute which points to any contrary construction or meaning. There must be a receiving of the intelligence that the charge was dismissed by EEOC. To notify is to make known and usually in law connotes a notice given by some person, whose duty it was to give it, to some person who was entitled to receive it or be notified. Notice is given when it is communicated to another.

Reeves v. American Optical Co., 408 F. Supp. 297, 301 (W.D.N.Y. 1976).

Although the notice of contest involved herein was mailed on the 30th day after receiving the second proposed assessment, it was not received by MSHA until more than 30 days had elapsed. I conclude that MSHA was not timely notified of Respondent's intention to contest.

Therefore, the notice of contest is hereby DISMISSED and the proposed assessment of \$440 is deemed the final order of the Commission.

James A. Broderick
James A. Broderick
Chief Administrative Law Judge

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