

CCASE:  
KTK MINING AND CONSTUCTION V. SOL (MSHA)  
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

KTK MINING AND CONSTRUCTION,  
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. KENT 89-47-R  
Citation No. 2772892; 11/2/88

No. 3 Mine

Mine ID 15-16308

ORDER DENYING MOTION TO DISMISS

The Secretary of Labor has moved to dismiss the instant proceeding for untimely filing. The evidence is undisputed that the citation at bar, Citation No. 2772892, was issued pursuant section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act", on November 2, 1988. It is further undisputed that Contestant, K T K Mining and Construction, Inc., (KTK), mailed its notice of contest by certified mail to the Office of the Solicitor, U.S. Department of Labor, Mine Safety Division on December 12, 1988. The Secretary argues in her Motion to Dismiss that KTK's Notice of Contest was not timely because it was not received by the Office of the Solicitor until December 5, 1988, more than 30 days after the receipt of the citation by KTK.

Section 105(d) of the Act requires an operator to notify the Secretary within 30 days of the receipt of a citation, (or notice of proposed assessment of penalty) that it intends to contest the issuance of the citation (or notice of proposed assessment of penalty). The Secretary argues that section 105(d) requires that the Secretary receive "actual" notice of an operators intent to contest within 30 days and that, therefore, KTK's certified mailing was not effective as it was not received until December 5, 1988.

In Secretary v. J. P. Burroughs and Son, Inc., 3 FMSHRC 854 (1981) the Commission addressed the validity of a Notice of Contest which was mailed to the Secretary within the specified 30 days but which was not received until after that deadline had expired. The mine operator in J. P. Burroughs mailed its Notice of Contest to the Secretary on the 30th day after receipt of a proposed assessment of penalty. The

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Secretary received the Notice of Contest two days later. The issue in that case was similarly whether the Secretary must receive the operator's Notice of Contest within 30 days or whether the operator satisfies the requirement of notifying the Secretary if it mails its Notice of Contest within 30 days. The Commission found therein that in fact mailing within 30 days constituted sufficient and effective notice under the Act. While the J. P. Burroughs case involved interpretation of Section 105(a) of the Act, Section 105(d) of the Act contains virtually identical language requiring notice to the Secretary within 30 days of receipt of the challenged citation. J. P. Burroughs is accordingly persuasive authority on the interpretation to be placed upon section 105(d) of the Act. Accordingly I find that the mailing by KTK within the 30 day time period set forth in section 105(d) of the Act by certified mail meets the filing requirement under that section of the Act and accordingly KTK filed its Notice of Contest in a timely manner. The Secretary's Motion to Dismiss is therefore denied.

Gary Melick  
Administrative Law Judge  
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