

CCASE:
MSHA V. J.P. BURROUGHS & SON
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, DC
June 12, 1980

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

Docket No. LAKE 80-223-M

v.

J. P. BURROUGHS & SON, INC.,

DECISION

This civil penalty proceeding was initiated on April 17, 1980, when the Secretary of Labor filed a proposal for a penalty with the Commission pursuant to section 110(a) of the Act and Commission Rule 27, 29 CFR \$2700.27 (1979). Simultaneously, the Secretary filed a motion to dismiss, with a request that the Secretary's proposed penalties be assessed as a final order of the Commission. The basis for the Secretary's motion was that the operator's notice of contest was not received by the Secretary within 30 days after the operator received the Secretary's initial notification of proposed penalty, as provided by section 105(a) of the Act and Commission Rule 26, 29 CFR \$2700.26 (1979). On April 30, the administrative law judge granted the Secretary's motion. On that same day, the operator mailed to the judge its opposition to the Secretary's motion. 1/ The opposition was received on May 2, after the judge issued his final disposition. On June 9, we granted the operator's petition for discretionary review.

Commission Rule 10(b), 29 CFR \$2700.10(b) (1979), provides that a statement in opposition to the motion may be filed by any party within 10 days after the date of service." Rule 8(b), 29 CFR \$2700.8(b) (1979), provides that "[w]hen service of a document is by mail, 5 days shall be added to the time allowed by these rules for the filing of a response or other document." The Secretary's motion to dismiss was served on the operator by mail on April 17. Thus, the

operator had 15 days, or until May 2, within which to file an opposition to the motion. 2/

1/ In its opposition, the operator challenged the Secretary's position on the timeliness of its notice of contest.

2/ Rule 5(d), 29 CFR §2700.5(d), provides, in pertinent part, that "[f]iling is effective upon receipt, or upon mailing by certified or registered mail, return receipt requested...." In this case, the operator's opposition was sent by certified mail. Thus, it was filed on April 30th, the day it was mailed to the judge.

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The judge erred in ruling on the Secretary's motion and issuing his final disposition without waiting for and considering the operator's timely opposition to the motion. Accordingly, the judge's order is vacated and the case is remanded for further proceedings consistent with this decision.

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Distribution

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