CCASE:
SOL (MSHA) V. PEERLESS EAGLE COAL CO.
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. HOPE 79-145-P A.O. No. 46-01616-03003
v.	Mine No. 2A
PEERLESS EAGLE COAL COMPANY, RESPONDENT	

DECISION AND ORDER ASSESSING DEFAULT PENALTY

After the retirement of Judge Littlefield and reassignment of the captioned matter to the presiding judge, (Footnote 1) a notice of hearing and pretrial order issued on August 7, 1979. Pursuant to Rule 25 of the Interim Rules of Procedure (Rule 28 of the Revised Rules) the operator was required to file on or before Friday, September 7, 1979, a plain and concise statement of the reasons it was contesting each violation and/or the amount of each penalty, together with a statement as to whether the operator claimed the payment of a maximum penalty for each violation charged would impair its ability to continue in business. The order further stated that "except for good cause shown in advance thereof, any failure to comply in full and on time with the provisions of this order shall be deemed cause for the issuance of an order of dismissal or default." Respondent failed to comply with any of the terms of the pretrial order.

Pursuant to Rule 63 of the Revised Rules an order to show cause why respondent should not be held in default and a summary order entered assessing the proposed penalties as final issued on September 12, 1979, returnable on or before Friday, September 21, 1979. The show cause order was receipted for by respondent's attorney on Friday, September 14, 1979.

Based on an independent evaluation and de novo review of the circumstances as set forth in the Secretary's response to the pretrial order, and more particularly the statements of the inspector and his supervisor, I find that the amount of the penalties warranted for the violations charged are as follows:

Citation No. 044225 - 30 CFR 75.1105

The supervisor's statement and a consideration of the circumstances persuades me that the violation of the requirement that the air current ventilating a permanent dewatering pump be directly coursed into a return airway created only a remote hazard of smoke inhalation for miners working inby the intake airway. I conclude that the violation was nonserious and resulted from a low degree of ordinary negligence. I find therefore that the penalty warranted is $300.00.

Citation No. 044226 - 30 CFR 75.200

The statements of the inspector and supervisor and a consideration of the circumstances persuades me that the failure to scale down loose roof in an area measuring 15 by 15 feet which was travelled only once a week by a certified preshift examiner or fire boss created only a remote roof fall hazard for one miner, namely the examiner who should have reported the condition for correction. I find therefore that it was a knowing violation attributable to a high degree of negligence on the part of the examiner and imputable to the operator, but that the improbability of a fatal or disabling injury requires a finding that the violation was not serious. For these reasons, I conclude that the penalty warranted is $300.00.

I take note of the fact that Rule 63(b) apparently contemplates the presiding judge "shall" issue an order of default "assessing the proposed penalties as final." Here the penalties proposed by the Assessment Office were $620.00 for the ventilation violation and $470.00 for the roof violation. Rule 29(b) and section 110(i) of the Act, however, require that "in determining the amount of penalty neither the Judge nor the Commission shall be bound by a penalty recommended by the Secretary or by any offer of settlement made by any party."

I construe Rule 29(b) and section 110(i) to require the Judge and the Commission to make an independent evaluation and de novo review of proposed penalties based on the evidence relating to the nature of the violation and the six statutory criteria. Since I find Rule 29(b) and section 110(i) govern the assessment of default as well as adjudicated penalties, I conclude the mandatory language of Rule 63(b) must be considered as inadvertant and the rule read in harmony with the governing terms of the statute. In this regard, I note that both the Commission and the Occupational Safety and Health Review Commission have construed the cognate penalty provisions of the two statutes (Footnote 2) as

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permitting the judges and the Commissions to determine whether a contested penalty should be more or less than that proposed by the Secretary. Secretary v. Shamrock Coal Co., BARB 78-82-P, FMSHRC 79-6-5, 1 FMSHRC Decisions 469 (June 7, 1979); Long Manufacturing Co. v. Brennan, 554 F.2d 903, 908 (8th Cir. 1977); Brennan v. OSHRC, 487 F.2d 438, 441-442 (8th Cir. 1974).

Accordingly, it is ORDERED that respondent be, and hereby is, declared in DEFAULT. It is FURTHER ORDERED that a penalty of $600.00 be, and hereby is, assessed and that respondent pay this amount on or before Monday, October 15, 1979.

Joseph B. Kennedy
Administrative Law Judge

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~Footnote-one

1 Judge Littlefield had denied a motion to remand the matter to the Assessment Office and had issued a pretrial order which was superseded by the order of August 7, 1979.

~Footnote-two

2 The language of the applicable provisions of the Occupational Safety and Health Act, 29 U.S.C. 666(i), tracks that of section 110(i) of the Mine Act.