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SOL (MSHA) V. MADISON GRANITE
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

Civil Penalty Proceeding

Docket No. WEST 79-323-M
A/O No. 02-01510-05002

v.

Crushed Granite Operation

MADISON GRANITE COMPANY,
RESPONDENT

DECISION

At 9:00 a.m. Tuesday, September 23, 1980, the above-captioned action came on for hearing in accordance with the Notice of Hearing issued July 24, 1980.

The Solicitor was present on behalf of the Mine Safety and Health Administration. Operator's counsel did not appear. At 9:15 a.m. I telephoned the office of operator's counsel and was advised by his secretary that he was on his way to the hearing. At 9:40 a.m., operator's counsel not having appeared, I again telephoned his office and was informed by his secretary that he was at another hearing and that this matter was not written down on his calendar. Counsel's secretary asked for an opportunity to contact him which I granted. At 10 a.m. I once more telephoned and the secretary stated that she had been unable to reach counsel. Thereafter we went on the record and the Solicitor moved for a default. I reserved ruling on the motion.

The Notice of Hearing was mailed to operator's counsel Certified Mail Return Receipt Requested and the file contains the return receipt.

On September 25, 1980 I issued an Order for the operator to show good cause for counsel's failure to appear and good cause why the Solicitor's motion for default should not be granted.

The Order to Show Cause crossed in the mails with a letter dated September 24, 1980 from operator's counsel which stated:

In my many years of practice, the first time that I have not appeared at a scheduled matter occurred on September 23, 1980 in the hearing before you.

Although I thought that my calendar was fail-safe, somehow or other there was a failure to make an entry on the proper date.

When your default is entered, I will take care of the judgment with my personal check.

~2921

In light of the letter from operator's counsel I find there was no good cause shown for the failure to appear, the Solicitor's motion for default should be granted and an order should be entered for penalties in the originally assessed amount of \$194.

Operator and counsel should be aware of the fact that the government incurred substantial expenses in this matter including travel to Phoenix, a hearing site close to the operator. I believe I have authority to assess costs if I wished to do so. After consideration of the matter, including the frank and forthright letter from operator's counsel, I have decided not to levy costs against the operator in this instance.

In addition, operator and counsel should be aware that the logistics of obtaining a hearing site convenient for the operator, and most particularly the securing of an adequate hearing room, are most difficult and time-consuming. (FOOTNOTE 1) I trust this situation will not recur.

ORDER

It is hereby ORDERED that the operator pay \$194 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge

~FOOTNOTE_ONE

1 It is especially for this reason that the Commission's recent decision in Sewell Coal Company Docket Nos. HOPE 79-6-P, is so disturbing.