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SOL (MSHA) V. ROYAL DARBY COAL
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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), v.	PETITIONER	Civil Penalty Proceeding Docket No. KENT 80-220 Assessment Control No. 15-07077-03017 V
ROYAL DARBY COAL COMPANY, INC., RESPONDENT		No. 1 Mine

DEFAULT DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
No one appeared at the hearing on behalf of Respondent

Before: Administrative Law Judge Steffey

When the hearing in the above-entitled proceeding was convened in Barbourville, Kentucky, on November 19, 1980, pursuant to written notice of hearing dated September 24, 1980, and received by respondent on September 26, 1980, counsel for the Secretary of Labor entered his appearance, but no one appeared at the hearing to represent respondent.

Section 2700.63(a) of the Commission's Rules of Procedure provides that when a party fails to comply with an order of a judge, an order to show cause shall be directed to the party before the entry of any order of default. An order to show cause was sent to respondent on November 21, 1980, pursuant to 29 C.F.R. 2700.63(a). A reply to the show-cause order was timely filed by the operator on December 1, 1980. The operator states that he was unable to attend because his father passed away on the evening of November 18, 1980, and was buried November 21, 1980. In such circumstances, the operator asks that he not be held in default and that another hearing be scheduled.

It seems harsh to find an operator in default in circumstances which show that the operator's father died on the evening of the day preceding the day on which the hearing was scheduled to be held. I would be willing to find that respondent had satisfied the show-cause order and I would be willing to reschedule the hearing if the operator had stated that he made any effort whatsoever to notify me before the hearing of the fact that his father's death would prevent him from being able to be present at the hearing. The operator knew that the hearing was scheduled to be held in the

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conference room at the Office of the Mine Safety and Health Administration in Barbourville, Kentucky. That office opens for business at 7:00 a.m. each day and MSHA's employees do not leave until 5:30 p.m. Even after 5:30 p.m., a member of the custodial force will answer the phone if a call is made to the office.

Respondent's failure to call the MSHA office on November 18, 1980, or on the morning of November 19, 1980, caused us to have to pay a reporter for being present at a hearing which lasted about 2 or 3 minutes. Additionally, the Secretary's counsel drove all the way from Nashville, Tennessee, to Barbourville, Kentucky, for the sole purpose of representing MSHA at the hearing because all other cases scheduled on or after November 19, 1980, were either settled or continued long in advance of the time set for the convening of the hearing in this proceeding.

The operator's answer to the show-cause order does not state specifically what time his father died. Even assuming that his father died at 11:59 p.m., which is as late as the death could have happened and still be said to have occurred on November 18, 1980, a call to the MSHA office at 7:00 a.m. on November 19, 1980, would have enabled the reporter, MSHA's attorney, the inspector, and me to start our return trips to our various offices instead of waiting around, as we did, for well over an hour after 9:00 a.m. to provide the operator with the hearing he had requested in the event he should make a tardy appearance.

I previously held a hearing in Barbourville on August 8, 1978, with respect to the operator's cases in Docket Nos. BARB 78-387-P and BARB 78-419-P. At that hearing, the operator presented his section foreman as a witness and introduced documentary evidence. The citation involved in this proceeding was served by the inspector on respondent's section foreman. Therefore, the operator was forced to rely upon the first-hand knowledge of his section foreman to present a defense to the alleged violation. In this proceeding, the hearing was scheduled to be held on the morning of November 19, 1980. Consequently, respondent would have had to have prepared for the hearing on November 18, 1980, prior to the death of his father who is said to have died on the evening of November 18. Preparation for the hearing would at least have involved his alerting his section foreman to be ready to travel to Barbourville early in the morning because the operator had to drive to Barbourville, Kentucky, from Louellen, Kentucky, a distance of about 45 miles. If the emotional stress associated with the death of the operator's father caused him temporarily to forget about the hearing, his section foreman would have reminded him very early the next morning that he had failed to meet the section foreman for the trip to Barbourville.

Additionally, as I noted in my decision issued February 7, 1979, in Docket Nos. BARB 78-387-P and BARB 78-419-P, the operator has a history of ignoring his obligations with respect to our hearings. On pages 1 and 2 of my decision in Docket Nos. BARB 78-387-P, et al., I noted that respondent had requested an opportunity to file a posthearing brief. He was given a period

of 30 days after receipt of the transcript within which to file
the

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brief. The operator never did file that posthearing brief and never did notify me that he no longer wished to file a brief even though I waited for 5 months after the transcript was received before writing my decision in order to give him plenty of time within which to file the brief. My decision also noted on page 1 that the operator had made similar requests in other hearings and had never filed a brief in any instance after he had requested an opportunity to do so.

The foregoing facts show that the operator has consistently ignored his responsibilities as a participant in our proceeding and has shown indifference to the expenses to the Government and time wasted by Government personnel in providing him with procedural due process. I find that the operator has shown no reason in his answer to the show-cause order why he could not have notified me or the MSHA office of his father's death so that at least some of the time, effort, and expense associated with providing him with an opportunity for a hearing on November 19, 1980, could have been avoided.

For the foregoing reasons, I find respondent to be in default. Section 2700.63(b) of the Commission's Rules of Procedure provides that when a judge finds a respondent to be in default in a civil penalty proceeding, he shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid.

WHEREFORE, it is ordered:

Within 30 days from the date of this decision, Royal Darby Coal Company, Inc., shall pay a civil penalty of \$500.00 which was proposed by the Assessment Office with respect to the violation of section 75.200 alleged in Citation No. 746688 dated September 24, 1979.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)