

CCASE:
WADE TEETS V. EASTERN COAL
DDATE:
19820728
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

WADE G. TEETS,	COMPLAINANT	Complaint of Discharge, Discrimination, or Interference
v.		
EASTERN ASSOCIATED COAL CORPORATION,	RESPONDENT	Docket No. WEVA 82-153-D Federal No. 1 Mine

DEFAULT DECISION

The complaint in the above-entitled proceeding was filed on February 8, 1982, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977. Inasmuch as the complaint was filed without benefit of legal advice, I wrote a letter to complainant on March 18, 1982, explaining to him the procedures which would be used in holding a hearing and deciding the issues raised by his complaint. The letter also requested that complainant notify me by May 20, 1982, whether he expected to obtain an attorney to represent him at the hearing. The letter emphasized that it was necessary for him to decide before the case was set for hearing whether he intended to obtain an attorney so that the hearing would not be delayed after a date for the hearing had been scheduled in a formal notice of hearing. The letter also explained to complainant that it would be necessary for him to answer the questions or interrogatories served upon him by respondent's attorney and explained the procedures he should follow in the event he wished to ask questions of respondent's personnel. Finally, the letter advised complainant that if he failed to respond to my request as to whether he expected to obtain an attorney, that he would receive a show-cause order requiring him to explain in writing why he should not be found to be in default and why his complaint should not be dismissed.

A return receipt shows that complainant received my letter on March 22, 1982, but complainant did not reply in any way to the letter of March 18, 1982. Therefore, on July 1, 1982, a show-cause order was issued requiring complainant to explain in writing by July 20, 1982, why he should not be found to be in default and why his complaint should not be dismissed for failure to reply to my request of March 18, 1982. The return receipt shows that complainant received the show-cause order on July 6, 1982, but complainant has submitted no response to the show-cause order.

Counsel for respondent filed on July 6, 1982, a motion for sanctions pursuant to Federal Rule of Civil Procedure 37(d) and 29 C.F.R. 2700.1. Federal Rule 37(d) provides in pertinent part as follows:

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or

managing agent of a party or a person designated under
Rule 30(b)(6) or 31(a) to testify

on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, * * * the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

The motion for sanctions correctly states that respondent duly filed interrogatories on complainant and obtained an order for leave to initiate discovery after expiration of the 20-day period provided for in section 2700.55(a) because the complaint in this proceeding was not served on respondent until March 3, 1982, although it had been filed with the Commission on February 8, 1982. Respondent's counsel then asked complainant to provide a date for taking his deposition. When complainant failed to respond to that request, respondent scheduled the deposition for April 29, 1982. That date was changed to May 6, 1982, after complainant's wife advised respondent's counsel that complainant was sick and unable to be present on April 29. Complainant's wife thereafter advised respondent's counsel that complainant would not be well enough to attend the deposition rescheduled for May 6. The time for completion of discovery was consented to by complainant and I issued an order on May 18, 1982, extending the time for completion of discovery to June 30, 1982. A new date of June 8, 1982, was set for the deposition and complainant was served with a notice of deposition.

The motion for sanctions further states that respondent's counsel traveled by automobile from Pittsburgh, Pennsylvania, to Fairmont, West Virginia, for taking complainant's deposition. A court reporter also appeared at Fairmont on June 8, 1982, in order to record the deposition, but complainant failed to appear. The motion therefore requests that complainant be required to pay the expenses of the court reporter, the mileage fees, and attorney's fees, or a total of \$439.75, incurred by respondent in its fruitless attempt to take complainant's deposition.

Complainant has filed no answer in reply to respondent's motion for sanctions.

Rule 37(d) provides that a judge may require a party to pay the expenses associated with failure to appear at an appointed

place for taking of a deposition if the judge elects not to take
the action provided for

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under Rule 37(b)(2), paragraphs (A), (B), or (C). Paragraph (C) provides that a judge, for failure of a party to appear at a deposition, may issue:

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

Although complainant did finally appear on June 22, 1982, for the purpose of giving a deposition in connection with the issues raised in this proceeding, respondent's counsel has filed copies of two different letters, the last one having been filed on July 21, 1982, in a futile attempt to persuade complainant to check the deposition for errors and return a signed copy of it to respondent's attorney.

Section 2700.63 provides that when a party fails to comply with an order of a judge or these rules, an order to show cause shall be directed to the party before the entry of any order of default or dismissal. As indicated above, a show-cause order was duly directed to complainant on July 1, 1982, requesting that he explain why he should not be found to be in default for failure to comply with my request of March 18, 1982, to the effect that he advise me as to whether he intended to obtain an attorney to represent him in this proceeding. He has at no time replied to any of my requests for information and he has been uncooperative in providing the information properly requested by respondent's counsel under the Commission's discovery procedures.

Section 2700.1 of the Commission's rules provides that a judge may be guided by the Federal Rules of Civil Procedure on procedural matters not regulated by the Commission's rules. I believe that complainant's failure to appear at the place scheduled for his deposition after respondent's attorney had already rescheduled the time for the deposition on two previous dates should also be considered as a ground for finding complainant in default. I find complainant to be in default pursuant to section 2700.63(a) of the Commission's Rules and Rule 37(b)(2), paragraph (C), of the Federal Rules of Civil Procedure.

WHEREFORE, for the reasons hereinbefore given, it is ordered:

(A) The motion for sanctions filed on July 6, 1982, is granted, but the relief given is granted under Federal Rule 37(b)(2), paragraph (C), instead of the alternative relief requested by respondent of ordering complainant to pay the cost of the deposition pursuant to Rule 37(d).

(B) The complaint filed in Docket No. WEVA 82-153-D is dismissed.

Richard C. Steffey

Administrative Law Judge
(Phone: 703-756-6225)