

CCASE:
SOL (MSHA) V. BILLY TIPPLE
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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

v.

BILLY MOON TIPPLE,
RESPONDENT

Civil Penalty Proceeding

Docket No. SE 81-50

A. C. No. 40-02512-03009 W

Moon Tipple No. 2

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 May 12, 1982, pursuant to written notice of hearing dated April 5, 1982, and received by respondent on April 7, 1982, counsel for the Secretary of Labor entered his appearance, but no one appeared at the hearing to represent respondent.

Under the provisions of 29 C.F.R. 2700.63(a), 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 May 17, 1982, pursuant to section 2700.63(a), requiring respondent to show cause why it should not be found to be in default for failure to appear at the hearing convened on May 12, 1982. Since respondent had failed to reply to the prehearing order issued February 5, 1982, in this proceeding, the show-cause order also required respondent to explain why it should not be held in default for failure to provide the information requested in the prehearing order. A return receipt in the official file shows that respondent received the show-cause order on May 20, 1982. Respondent was required to answer the show-cause order by June 7, 1982, but no reply has been received.

Respondent's owner, Mr. Billy Moon, called me at the motel in Barbourville about 7:30 p.m. on May 12, 1982, to explain why he had not been present at the hearing when it was convened about 1:30 p.m. on May 12, 1982. The reason given by Mr. Moon for not appearing at the hearing was that he had left home in plenty of time to drive to Barbourville before the hearing was due to commence, but the steering mechanism on his truck ceased working and it was necessary for him to take his truck to a garage. Mr. Moon said that it first appeared that the steering could be repaired in time for him to drive to Barbourville before the hearing, but subsequently it became clear to the mechanic that the problem was too serious

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to be repaired until late in the afternoon. Mr. Moon told me that he had called the MSHA office in Barbourville when he found that his vehicle could not be repaired in time for him to be at the hearing, but he was advised that MSHA's counsel, the reporter, MSHA's witnesses, and the judge had already left the building where the hearing was to be held.

The personnel in MSHA's Barbourville Office have always advised me promptly in the past when I have received telephone calls. I waited over 30 minutes after the scheduled hearing time for Mr. Moon to appear before the hearing was convened, and I did not leave the hearing room for over an hour after the hearing had been scheduled to begin. Therefore, it is difficult for me to understand how Mr. Moon could have called me as soon as it became clear that his truck could not be repaired in time for him to appear at the hearing.

Mr. Moon stated in his phone call to me on the evening of May 12 that his defense in this proceeding was that new equipment was being tested at the tipple when the citations were issued and that no coal was being processed. All of the civil penalties sought in this proceeding are for alleged violations of section 104(b) of the Act because, according to the orders of withdrawal, respondent continued to operate its tipple after the withdrawal orders had been issued. There is nothing in the official file to explain why respondent would have continued to operate its tipple, even for testing purposes, after withdrawal orders had been issued.

Moreover, the four withdrawal orders involved in this proceeding have little relationship, if any, to the mechanical operation of the tipple. The foregoing statement is based on the fact that the underlying citations were for (1) failure to replace a shattered windshield in an end loader, (2) failure to provide a certified person to make examinations for hazardous conditions, (3) failure to submit a noise survey as to two employees, and (4) failure to record the results of examinations of electrical equipment.

In any event, the show-cause order gave the operator an opportunity to explain why he failed to respond to the prehearing order, why he failed to give prompt notice of the fact that his truck had broken down, and why his defense of testing new equipment would have been relevant for avoidance of penalties for continuing to operate after withdrawal orders had been issued.

Inasmuch as no reply to the show-cause order has been submitted, I find respondent to be in default for failure to appear at the hearing convened on May 12, 1982, and for failure to reply to the prehearing order issued February 5, 1982. Section 2700.63(b) of the Commission's rules provides that "[w]hen the Judge finds the respondent in default in a civil penalty proceeding, the Judge shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid."

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WHEREFORE, it is ordered:

Billy Moon Tipple, having been found in default, is ordered, within 30 days from the date of this decision, to pay civil penalties totaling \$705.00 which are allocated to the respective alleged violations as follows:

Citation No. 979886 11/13/80	104(b) cited in Order No.	
986079 issued 9/19/80		\$ 130.00
Citation No. 979887 11/13/80	104(b) cited in Order No.	
986080 issued 9/19/80		150.00
Citation No. 979889 11/13/80	104(b) cited in Order No.	
979888 issued 11/13/80		125.00
Citation No. 983862 11/13/80	104(b) cited in Order No.	
986077 issued 9/19/80		300.00
Total Civil Penalties Proposed by Assessment Office ...		\$ 705.00

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