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SOL (MSHA) V. TAC & C ENERGY  
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TTEXT:

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. KENT 85-101  
A.C. No. 15-13086-03517

v.

No. 2 Mine

TAC & C ENERGY, INC.,  
RESPONDENT

DECISION

Appearances: Joseph B. Lockett, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee,  
for Petitioner.

Before: Judge Maurer

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment of \$420 for an alleged violation of 30 C.F.R. 75.1701, because of the asserted failure by the respondent to drill bore holes in advance of the working faces while within 75 feet of an abandoned adjacent mine.

The respondent contested the violation and requested a hearing. Pursuant to notice, a hearing was convened in Prestonsburg, Kentucky, on August 7, 1986, and while the petitioner appeared, the respondent did not. In view of the respondent's failure to appear, the hearing proceeded without him. For reasons discussed later in this decision, respondent is held to be in default, and is deemed to have waived his opportunity to be further heard in this matter.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 20 C.F.R. 2700.1 et seq.

Issue

The issue presented in this case is whether the petitioner has established a violation of section 30 C.F.R. 75.1701, and, if so, the appropriate civil penalty that should be assessed for the violation.

MSHA's Testimony and Evidence

The following MSHA exhibits were received in evidence in this proceeding:

1. A copy of the section 104(a) Citation No. 2463641, issued by Inspector Charles Slone on January 24, 1985.
2. A copy of the section 104(b) Order No. 2463648, issued by Inspector Charles Slone on January 29, 1985.
3. A copy of the Assessed Violation History Report for the respondent's No. 2 Mine from January 24, 1983, to January 23, 1985.

Inspector Slone testified that he conducted a routine spot inspection of the mine on January 24, 1985. When he reviewed the mine map he noticed that this mine had run parallel up beside an old, abandoned mine. After looking at the faces of entries one through six, he knew that entries five and six were mining close to this old adjacent mine. He estimated there was about 75 feet between the closest entry and the old works. Furthermore, while on the sections, he observed that there were no bore holes being drilled in advance of the working faces as 30 C.F.R. 75.1701 requires.

After the inspector determined that the required bore holes were not being drilled, he informed Mr. Stanley, the mine foreman, that this would be one of the violations issued that day. Stanley reportedly said that he did not have the proper steel to drill the bore holes on hand so he said he would stop number 5 and 6 headings until the bore holes were drilled. The inspector thereupon issued Citation No. 2463641 and made the termination due the following day, January 25, 1985.

With regard to that citation, he marked negligence as "moderate" because this was the first time he had cited an instance like this at this particular mine. He marked gravity as "reasonably likely". The danger in this situation being that if they broke through with the ripper head of the continuous miner into the old adjacent mine, there could have been an onrush of water, or methane, or

~1454

blackdamp.(FOOTNOTE 1) The inspector testified that this occurrence could have led to the deaths of the nine people working in this area. For these reasons, the inspector also determined that this violation was a "significant and substantial" one.

On January 29, 1985, Inspector Slone returned to the mine. When he determined that coal was being mined with a continuous miner in both number 5 and 6 entries without the bore holes being drilled, he issued section 104(b) Order No. 2463648 for failure to comply with the previously issued section 104(a) citation in that the bore holes still hadn't been driven and the time for abatement had elapsed. Subsequently, bore holes were drilled and the section 104(b) order was terminated.

The Secretary contends that this operator has a medium-size operation and I note from the company's violation history report for the two (2) years prior to this violation that it had a relatively unremarkable violation history.

#### Respondent's Failure to Appear at the Hearing

The record in this case indicates that a Notice of Hearing dated June 26, 1986, setting this case down for hearing in Prestonsburg, Kentucky, on August 7, 1986, was received by the respondent on July 3, 1986. The postal service certified mail return receipt card was signed by Sonja Darlington. Further, a Notice of Hearing Site dated July 30, 1986, was received by the respondent on August 1, 1986. The green return receipt card was signed by Rhonda Darlington.

When the respondent failed to appear at the appointed time and place, the hearing proceeded in his absence. On August 25, 1986, pursuant to Commission Rules, 29 C.F.R. 2700.63, I issued an Order to Show Cause to the respondent to show cause as to why it should not be defaulted for its failure to appear at the hearing. The respondent replied by

~1455

letter dated September 4, 1986, received on September 11, 1986.  
That letter, in its entirety, states:

Mr. Roy J. Maurer:

The reason I was unable to attend Docket No. Kent  
85A101 case on August 7, 1986 was because legal  
problems that I had to take care of at my other mines  
in Boon County, W.Va.

This was all unexpected and I was not able to get in  
contact with anyone to ask for a delay.

Thank you,

/Signature/

Glenn H. Trent Jr.  
President

This is a totally unsatisfactory showing of good cause for  
failing to appear at the hearing, or sending someone else to  
represent the corporation, or at least giving some notice of  
inability to appear to either myself or counsel for the  
petitioner. Under the circumstances, I conclude and find that  
respondent has waived his right to be heard further in this  
matter and that he is in default.

#### Fact of Violation

I conclude and find that the petitioner has established a  
violation of 30 C.F.R. 75.1701 by a preponderance of the  
evidence. The testimony of Inspector Slone fully supports the  
citation which he issued and it IS AFFIRMED. Furthermore, I  
conclude and find that the violation is significant and  
substantial and the inspector's finding in this regard is  
likewise AFFIRMED.

#### Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and  
taking into account the requirements of section 110(i) of the  
Act, I conclude and find that the proposed civil penalty  
assessment of \$420 is appropriate in this case.

#### ORDER

Respondent IS ORDERED to pay a civil penalty in the amount  
of \$420 within thirty (30) days of the date of this decision, and  
upon receipt of that payment by MSHA, these proceedings are  
dismissed.

Roy J. Maurer  
Administrative Law Judge

1 The term "blackdamp" is defined in the Bureau of Mines,  
U.S. Department of Interior, A Dictionary of Mining, Mineral, and

Related Terms (1968) at 108:

Generally applied to carbon dioxide. Strictly speaking a mixture of nitrogen and carbon dioxide. The average blackdamp contains 10 to 15 percent carbon dioxide and 85 to 90 percent nitrogen.... An atmosphere depleted of oxygen rather than containing an excess of carbon dioxide.... It extinguishes light and suffocates its victims.