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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
January 8, 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner — CIVIL PENALTY PROCEEDING; Docket No. YORK 89-46-M; A. C. No. 18 00275 05521

v. — Branchville Mine

A. H. SMITH STONE COMPANY, Respondent

DECISION OF DEFAULT

Before: Judge Merlin

This case is before me pursuant to the Commission's order dated November 20, 1989.

On October 24, 1989, I entered an Order of Default because the operator failed to answer or otherwise comply with a show cause order issued on August 10, 1989. The operator appealed and the Commission returned the case to me for evaluation of the operator's explanations. On November 29, 1989, I directed the operator to explain what circumstances justified its failure to comply and I directed the Solicitor to state her position.

The Solicitor has taken the position that there are insufficient reasons to excuse the operator's failure to timely respond to the show cause order. In particular, the Solicitor argues that the operator's contention that the order to show cause was misfiled and overlooked is not an adequate reason to reopen the case. The Solicitor notes that the operator's representative, while not attorney, has routinely participated in MSHA cases and her failure to meet filing deadlines has been excused in the past.

For its part, the operator first asserts that an answer was not timely filed because the research necessary to complete the answer would be time-consuming and possibly impossible. Its representative alleges that the persons who were the plant supervisor and the safety director at the time of the alleged violations are no longer employed by the company and are either not cooperative or not accessible. However, she does not elaborate on the reasons or circumstances surrounding these

individuals, merely stating that the only other person who "may" have knowledge is one of the company owners who has numerous responsibilities and other demands on his time.

These statements are not sufficient to justify the failure to answer. 29 C.F.R. $ 2700.28 provides that the operator's answer shall contain a short and plain statement of the reasons why the violations are contested. In Docket Nos., VA 89-3, VA 89-4, VA 89-28, VA 89-44 and YORK 89-24, YORK 89-35, YORK 89-36, YORK 89-40, YORK 89-43, and YORK 89-44, the operator's representative failed to answer timely and received show cause orders which specifically advised her that an answer is nothing more than a short and plain statement of the reasons why the operator disagrees with the alleged violations. In response to the show cause orders in the York dockets supra, the operator's representative filed a one line answer for all of them, which I accepted. Accordingly, detailed research is not necessary for an answer, and the operator has been told this repeatedly. Although some employees may have left the company's employment, no explanation is offered why they were not accessible or cooperative or whether they were diligently pursued. Furthermore, there is no showing that the operator's president did not have the time to furnish the minimal information necessary to answer.

In addition, if the operator did in fact, believe it could not file an answer on time, it could have requested an extension. 29 C.F.R. 2700.9. This operator has had many cases before the Commission and its representative has requested extensions to answer in other cases, which requests I granted. See, e.g., VA 89-3-M and VA 89-4-M. There is no reason why in this case the operator could not have requested an extension of time as provided for by Commission rules.

The operator's second assertion that it did not answer the show cause order because it was misfiled and therefore, overlooked is inadequate. As stated in my November 29 order, since the operator's representative is well versed in the practices and procedures of this Commission, a bare allegation of misfiling standing alone would not be sufficient and therefore, she was directed to explain in full the circumstances. She has, however, not done so. Her letter dated December 18, 1989, merely states the show cause order was misfiled.

In Docket No. VA 88-44-M the Commission remanded the case to me, where a default had been entered because this operator failed to answer although two show cause orders had been issued. In that case, however, there was some confusion over the identity of the proper individual to receive the operator's mail. 11 FMSHRC 796 (May 1989). In response to my order to submit information, the operator's representative advised that the case "fell through the cracks" and was not handled properly. But she asserted this

was not usual and that the operator's legal identity reports had been updated. Acknowledging the Commission's admonition that default is a harsh remedy, I vacated the default in that case. In the instant case there was no confusion over mailing and there is no reason to yet again excuse the operator's failure to timely file her responses.

It must be borne in mind that as the November 29 order points out, and as the Solicitor now argues, this operator and its representative have appeared in many Commission cases. As noted, several of these cases have been before me. A review of the files discloses that in all my cases the operator was late in filing its answer.

As previously stated, I bear in mind the Commission's oft stated view that default is a harsh remedy. Accordingly, upon remand to me for reconsideration of default orders I have heretofore, after reviewing the files and additional information submitted by the parties, vacated defaults in every such case. But there comes a point where the conclusion is inescapable that Commission process and leniency are being so abused that relief from default is not warranted. Regrettably, this is a case where that point has been reached.

Accordingly, it is ORDERED that the operator be held in Default and that this case be DISMISSED.

Paul Merlin
Chief Administrative Law Judge

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