

CCASE:  
SOL (MSHA) V. BROKEN HILL MINING  
DDATE:  
19930318  
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-610
Petitioner	:	A.C. No. 15-15637-03539
v.	:	
	:	Docket No. KENT 92-700
BROKEN HILL MINING COMPANY,	:	A.C. No. 15-15637-03540
INCORPORATED,	:	
Respondent	:	No. 1 Mine
	:	

DEFAULT DECISION

Appearances: Mary Sue Taylor, Esq., U.S. Department of Labor,  
Office of the Solicitor, Nashville, Tennessee  
for Petitioner;

Before: Judge Feldman

These cases are before me based upon petitions for assessment of civil penalties filed by the Secretary against the respondent corporation. This matter was heard on January 21, 1993, in Huntington, West Virginia. At the hearing, the Secretary presented his direct case through the testimony of Mine Inspectors John Church and Buster Stewart. Although being duly served with Notices of Hearing dated November 18, 1992, and January 13, 1993, the respondent failed to appear at the scheduled hearing. For the reasons noted below, I find the respondent has defaulted in this matter. Consequently, I am issuing the following default judgment in accordance with Commission Rule 63(b), 29 C.F.R. 2700.63(b).

As noted at trial, Hobart Anderson, President of the respondent corporation, has had ample notice of this proceeding. On the day of the hearing I directed counsel for the petitioner to call Mr. Anderson's office at 9:00 a.m., to determine why he had not arrived at the hearing. Mr. Anderson's office is only a few minutes from the hearing location. Mr. Anderson's secretary was advised that a default decision would be issued if he did not appear at the hearing by 10 a.m. Although Mr. Anderson's secretary stated that she would contact him by beeper, Mr. Anderson failed to appear.

On January 22, 1993, Mr. Anderson called me to apologize for his failure to participate in the hearing. On January 28, 1993, I issued an Order to Show Cause directing Mr. Anderson to explain why a default decision should not be issued. Mr. Anderson

~516

replied on February 18, 1993. In his response, Mr. Anderson apologized and stated that, "There was confusion on my part as to the date of hearing. I did not realize that the hearing was on for that date." Mr. Anderson's "confusion" does not constitute an adequate justification for his failure to appear.

Despite Mr. Anderson's failure to attend, I required the Secretary to present its direct case to support the 104(a) citations and 104(b) orders issued in these proceedings. The testimony of Inspectors Church and Stewart concerning the occurrence of the violations as alleged and the significant and substantial nature of these violation is of record and need not be repeated. Therefore, I am affirming the citations for the specified violations as issued.

However, I am troubled by the rationale provided by Inspector Stewart for the issuance of the 104(b) orders. The respondent is apparently mining its No. 1 Mine on a contract basis. Mining operations were suspended approximately January 1, 1992, when Island Creek Coal Company sold its ownership interest in the No. 1 Mine to A. T. Massey. During this change in the underlying ownership of the mine, the respondent's coal production activity was temporarily suspended and the mine was placed in non-productive status. (Tr.40-41). Inspector Stewart testified that the 104(b) orders associated with the citations noted below were issued to ensure that the cited violations would be abated prior to the respondent's resumption of coal production. In this regard, Inspector Stewart testified that:

I issued the [104(b) orders] because compliance and noncompliance could not be determined, you know, there was no one at the mines (sic). You didn't know whether they was fixed or whether they wasn't fixed (sic). And we had extended them all the time that I felt was necessary and justified. (Tr. 46).

Inspector Stewart further testified that he did not intend to issue the 104(b) orders. However, he stated that he could not find anyone at the mine in order to determine if the violations had been abated. (Tr.81-82). Finally, Inspector Stewart testified that it was his belief that the 104(b) orders increased the proposed penalties for the underlying citations. (Tr. 94).

Section 104(b) of the Mine Act authorizes the issuance of withdrawal orders for failure to abate a citation. Section 104(a) of the Act, however, requires that the operator be afforded a reasonable abatement period to correct a violative condition. In the current case, the abatement orders were issued because the mine was idle and the inspector was unable to determine if the violation was terminated. It is the failure to abate rather than the inspector's inability to determine if

~517

abatement has occurred which provides the basis for the imposition of sanctions under Section 104.(Footnote 1) The Secretary has failed to establish that the pertinent violations were not abated at the time of the March 13, 1992, issuance of the subject orders. Accordingly, the 104(b) orders must be vacated.

In view of the above, I am vacating the 104(b) orders shown below and I am reducing the assessed penalties for the underlying violations associated with these orders. My decision with respect to the citations and orders in issue is as follows:

Docket No. KENT 92-610

Citation or Order No.	Date	Type of Action	30 C.F.R. Section	Proposed Penalty	Assessed Penalty
3814394	9/25/91	104 (a) C	75.523-3	\$112	\$112
3814395	9/25/91	104 (a) C	75.523-3	\$112	\$112
3805841	12/12/91	104 (a) C	75.1722A	\$240	\$160
3806378	3/13/92	104 (b) O			vacated
3805842	12/12/91	104 (a) C	75.523-2(c)	\$240	\$160
3806379	3/13/92	104 (b) O			vacated
3805843	12/12/91	104 (a) C	75.503	\$ 85	\$ 85
3805845	12/12/91	104 (a) C	75.523-2(c)	\$240	\$160
3806342	3/13/92	104 (b) O			vacated
3805846	12/12/91	104 (a) C	75.400	\$325	\$218
3806343	3/13/92	104 (b) O			vacated

Docket No. KENT 92-700

3814396	9/25/91	104 (a) C	75.523-3	\$305	\$204
3806345	3/13/92	104 (b) O			vacated
3814397	9/25/91	104 (a) C	75.523-3	\$305	\$204
3806346	3/13/92	104 (b) O			vacated

---

1 Although the operator is obliged to keep the inspector informed concerning its progress in its abatement efforts, imposition of this obligation presupposes active mining operations.

~518

3805844	12/12/91	104 (a) C	75.503	\$240	\$160
3806341	3/13/92	104 (b) O			vacated
3805847	12/12/91	104 (a) C	75.316	\$325	\$218
3806344	3/13/92	104 (b) O			vacated

ORDER

ACCORDINGLY, a Default Judgement IS ENTERED in favor of the Petitioner, and the Respondent IS ORDERED to pay a civil penalty of \$1,793 in satisfaction of the violations in issue. Payment is to be made within (30) days of the date of this decision.

Jerold Feldman  
Administrative Law Judge

Distribution:

Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Mr. Hobart W. Anderson, President, Broken Hill Mining Co., Inc., P.O. Box 989, Ashland, KY 41105 (Certified Mail)

vmy