

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 6, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 94-181-M
Petitioner	:	A. C. No. 23-01785-05528
v.	:	
	:	Moberly Stone Company
MOBERLY STONE COMPANY,	:	
Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U. S. Department of Labor, Denver, Colorado, for
the Secretary;
No appearance for Respondent.

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 \$385 for five alleged violations of the mandatory safety standards found in 30 C.F.R. Part 56.

The respondent contested the violations and requested a hearing. Pursuant to notice, a hearing was convened in Moberly, Missouri, on March 7, 1995, and while the petitioner appeared, the respondent did not. In view of the respondent's failure to appear, the hearing proceeded without them. For reasons discussed later in this decision, respondent is held to be in default, and is deemed to have waived its opportunity to be further heard in this matter.

ISSUE

The issue presented in this case is whether the petitioner has established the violations cited, and, if so, the appropriate civil penalty that should be assessed for the violations.

MSHA'S TESTIMONY AND EVIDENCE

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

1. A copy of the proposed assessment data sheet (Exhibit P-1).
2. A copy of section 104(a) Citation No. 4322264, issued by Inspector LeRoy Parmalee on April 19, 1994 (Exhibit P-2).
3. A copy of section 104(a) Citation No. 4322265, issued by Inspector LeRoy Parmalee on April 19, 1994 (Exhibit P-3).
4. A copy of section 104(a) Citation No. 4322266, issued by Inspector LeRoy Parmalee on April 19, 1994 (Exhibit P-4).
5. A copy of section 104(a) Citation No. 4322267, issued by Inspector LeRoy Parmalee on April 19, 1994 (Exhibit P-5).
6. A copy of section 104(a) Citation No. 4322268, issued by Inspector LeRoy Parmalee on April 20, 1994 (Exhibit P-6).

The petitioner also presented oral testimony on the record at the hearing and based on all the evidence presented, I conclude and find that the violations have been established, and accordingly, the contested citations are affirmed as issued.

RESPONDENT'S FAILURE TO APPEAR AT THE HEARING

The record in this case indicates that after first giving the parties an opportunity to select their own trial date by Prehearing Order dated October 25, 1994, a Notice of Hearing

dated January 12, 1995, setting this case down for hearing in Moberly, Missouri, on March 7, 1995, was received by respondent on January 17, 1995. Respondent received the aforesaid Prehearing Order on October 27, 1994, but opted not to respond.

Respondent was first heard from by fax on February 15, 1995, requesting that the hearing be moved to Burlington, Iowa, on either a Monday morning or a Friday afternoon.

During a telephone conference between myself and the parties, where the petitioner objected to moving the date or location of the trial, I denied the respondent's motion and informed them that the hearing would proceed as scheduled.

On February 26, 1995, respondent faxed a request for reconsideration of that denial of their motion for continuance, wherein it is erroneously stated that: "[w]e were not given an opportunity to review our schedule before the date was selected by the Commission and MSHA." In point of fact, the trial date was selected entirely by the undersigned.

One of the purposes of the prehearing order is for the parties to mutually agree upon a trial date, and I will in all likelihood, accede to their wishes. However, if the parties cannot or do not present me with a mutually agreeable trial date, ultimately I must select one myself. But for the respondent to state they had no opportunity to have an input into the selection of a trial date is patently false. A prehearing order inviting their participation in selecting a trial date and by implication, a location, was received by them on October 27, 1994, by certified mail. They simply neglected to respond to it in a timely fashion, or for that matter, at all.

The respondent's prehearing motions to continue the hearing and change the venue of the hearing were both vigorously opposed by the Secretary on common sense grounds. The Secretary objected to the change in venue because the mine is located at Moberly, Missouri, and the witnesses for the Secretary are also located in central Missouri, as are the respondent's witnesses, if it should have chosen to present any testimony. The only reason advanced for the requested change of location is that respondent's attorney, whoever that might be, lives in Iowa. I note that

there has been no entry of appearance in the record by any attorney, anywhere. Be that as it may, in any event, it would have been more cost effective for all the parties¹ if respondent's attorney traveled to Moberly for the hearing, rather than all of the witnesses traveling to Iowa to accommodate him. The Secretary also objected to changing the date of the hearing since all the arrangements for both lawyer and witnesses had already been made to travel to Moberly on March 7. These objections were well-taken, and respondent's motions were denied.

As previously stated above, the hearing proceeded in the respondent's absence. The Secretary put in his case and then by counsel, moved that a default judgment be entered against the respondent pursuant to Commission Rule 66(b), 29 C.F.R. ' 2700.66(b),² and that the five citations at bar be affirmed and that the proposed civil penalty of \$385 be assessed against the respondent.

Under the circumstances in this record, I conclude and find that the respondent has waived its right to be heard further in this matter and that it is in default, and that the violations, as alleged, have been proven by a preponderance of the evidence, and that it is appropriate to assess the respondent the proposed civil penalty of \$385.

¹See generally, 29 C.F.R. ' 2700.51, which instructs the presiding judge to consider the convenience of both parties and their witnesses in assigning a hearing site.

²29 C.F.R. ' 2700.66(b) provides as follows:
Failure to attend hearing. If a party fails to attend a scheduled hearing, the judge, where appropriate, may find the party in default or dismiss the proceeding without issuing an order to show cause.

ORDER

Respondent is **ORDERED TO PAY** a civil penalty of \$385 to MSHA within 30 days of the date of this decision and upon receipt of payment, this matter is **DISMISSED**.

Roy J. Maurer
Administrative Law Judge

Distribution:

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dcp

EXHIBITS

EXHIBITS TO CENT 94-181-M (Moberly Stone Company)

Petitioner's Exhibits

Exhibit P-1 - R34- Assessed Violation History Report

Exhibit P-2 - Citation No. 4322264

Exhibit P-3 - Citation No. 4322265

Exhibit P-4 - Citation No. 4322266

Exhibit P-5 - Citation No. 4322267

Exhibit P-6 - Citation No. 4322268