FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., 6TH FLOOR

WASHINGTON, D. C. 20006-3868

April 10, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-1199
Petitioner	:	A. C. No. 15-14959-03561
	:	
v.	:	Docket No. KENT 97-1200
BROKEN HILL MINING COMPANY,	:	A. C. No. 15-14959-03562
Respondent	:	
	:	Docket No. KENT 95-240
	:	A. C. No. 15-14959-03569
	:	
	:	Docket No. KENT 95-310
	:	A. C. No. 15-14959-03570
	:	
	:	Mine No. 3

DECISION

Before: Judge Merlin

These matters are before me pursuant to the Commission=s order of remand dated March 14, 1997. These cases are petitions for the assessment of civil penalties filed by the Secretary of Labor against the operator under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' ' 815, 820. The case was assigned to an administrative law judge who is no longer with the Commission.

By notice dated December 19, 1996, the judge set a hearing for January 9, 1997. Commission records contain the return receipt showing that the notice was received by the operator. However, when the hearing was convened on the appointed day, the operator failed to appear. The operator has not explained its non appearance.

Section 2700.66 of Commission regulations, 29 C.F.R. ' 2700.66 (1996), provides that when a party does not appear at a hearing, the judge may find the party in default without issuing a show cause order. Prior versions of this regulation required the issuance of a show cause order

whenever a party failed to comply with a judge=s order. 29 C.F.R. ' 2700.63 (1991) (amended 1993). The comments to the present version make clear that elimination of the requirement for a show cause order under these circumstances was conscious and intentional. 55 Fed. Reg. 4853, 4856 (1990); 58 Fed. Reg. 12, 158 (1993).

In this case when it became obvious that the operator was not going to appear, the Solicitor moved on the record for a default judgment (Tr. 10). The judge stated that the motion was well taken (Tr. 10). However, the judge then said that the hearing would proceed with the testimony of the inspectors so that Awe=ll have some factual basis to assess the penalty@ (Tr. 13). Thereafter, the Solicitor elicited testimony from the inspectors about the violations contained in the subject penalty petitions (Tr. 21-84). After listening to the testimony regarding each citation, the judge Aaffirmed@ the citation (Tr. 38, 56-57, 69-70, 77-78, 85).

Section 2700.1(a) of Commission regulations, 29 C.F.R. ' 2700.1(a), provides that the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure. Rule 55(a) of the Federal Rules of Civil Procedure provides that when a party against whom a judgment for relief is sought fails to plead or otherwise defend, the party=s default may be entered. Under subparagraph (1) of Rule 55(b) when a claim is for a sum certain the clerk of the court shall enter a judgment for the amount due and under subparagraph (2) in all other cases the party entitled to a judgment by default must request it.

In applying Rule 55, the courts have stated that in a default situation all well pleaded allegations are taken as true. Benny v. Pipes, 799 F.2d 489, 495 (9th Cir. 1986), cert denied, 484 U.S. 870, 108 S. Ct. 198 (1987). And when a default judgment is entered, facts alleged in the complaint may not be contested. Black v. Lane, 22 F.3d 1395, 1399 (7th Cir. 1994). The standard for appellate review of a default judgment is whether the trial court committed an abuse of discretion. Johnson v. Gudmundsson, 35 F.3d 1104, 1117 (7th Cir. 1994). An entry of a default judgment is not an abuse of discretion where a party who fails to appear at a scheduled hearing, because such conduct strays from recklessness to bad faith. Id. Moreover, pro se representation does not excuse a party from complying with the court=s orders or the Federal Rules. Ackra Direct Marketing Corp. v. Fingerhut Corporation, 86 F.3d 852 (8th Cir. 1996). Wilful misconduct by a pro se litigant justifies entry of default even where the judgment is for a large amount. Id. Finally, where a party is put on notice of the amount of damages sought, he is not entitled to an evidentiary hearing on damages. Taylor v. City of Baldwin, Missouri, 859 F.2d 1330 (8th Cir. 1988). By it terms Rule 55 leaves the decision of whether a hearing on damages is necessary to the discretion of the judge. Fustok v. Conticommodity Services Inc., 873 F.2d 38 (2nd Cir. 1989).
Defaults have been analogized to dismissals for want of prosecution. Hritz v. Woma Corporation,

732 F.2d 1178, 1184 (3rd Cir. 1984). The Supreme Court has upheld such dismissals. National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 96 S. Ct. 2778 (1976); Link v. Wabash Railroad Company, 370 U. S. 626, 82 S. Ct. 1386 (1962). In National Hockey League, the Court recognized that use of this sanction was not only directed toward the particular conduct at issue, but also was designed to deter similar conduct in the future. National Hockey League, 427 at 643.

Section 110(a) of the Act, 30 U.S.C. ' 820(a), provides that a mine operator of a facility covered under the Act where a violation of a mandatory health or safety standard occurs, shall be assessed a civil penalty. The Secretary has the burden of proving a violation. Keystone Coal Mining Corp., 17 FMSHRC 1819, 1838 (November 1995). Where a violation is proved, section 110(i), 30 U.S.C. ' 820(i), sets forth six factors to be considered in determining the appropriate amount of a civil penalty as follows: gravity, negligence, prior history of violations, size, ability to continue in business, and good faith abatement.

Default judgments are not uncommon at the Commission. For fiscal year 1996 the Office of the Chief Administrative Law Judge entered defaults in 177 cases and for the first half of fiscal year 1997 there have been 73 such defaults. The defaults were entered by the Chief Judge because the operator either failed to answer or respond to a show cause order. In all those cases the facts set forth in the citations were accepted as true and the violations determined to exist. The inspector=s findings regarding gravity and negligence were accepted as well as the Solicitor=s representations for the other four criteria set forth in the petition and the operator was directed to pay the proposed penalty.

In the instant cases the operator=s failure to appear at the hearing was more serious than the failures in the Chief Judge defaults, because here the Government incurred the unnecessary expense of travel by the Judge, Solicitor, and court reporter and the fees of the reporter. In addition, the dereliction of this operator is particularly egregious since he is completely familiar with Commission procedures. He has appeared at hearings on the merits. Broken Hill Mining, 17 FMSHRC 1548 (September 1995); 17 FMSHRC 1539 (September 1995); 17 FMSHRC 338 (March 1995), affirmed, 19 FMSHRC ____, No. KENT 94-1208 (April 9, 1997). He has been a party to settlements. Broken Hill Mining, 16 FMSHRC 1949 (September 1994). Nor is this the first time this operator has ignored Commission procedure and orders. He has had an appeal dismissed by the Commission for failure to file necessary materials. Broken Hill Mining, 18 FMSHRC 679 (May 1996). And he previously failed to appear for a hearing. Broken Hill Mining, 15 FMSHRC 515 (March 1993). I am, of course, mindful that default is a harsh remedy. But this knowledgeable operator has chosen to scorn the process.

In light of the foregoing, it is clear that immediate entry of default for these cases would have

been proper and that the judge was not required to go on the record and take evidence regarding the violations. If the statements in the citations are taken as true, they establish the existence of the violations as well as the presence of gravity, negligence and good faith abatement. The printout submitted by the Solicitor shows the history of prior violations. Financial information regarding ability to continue in business is particularly within the province of the operator and it has long been recognized that it is the operator=s responsibility to come forward with such evidence. Spurlock Mining Company and Sarah Ashley Mining, 16 FMSHRC 697, 700 (April 1994); Sellersburg Stone Co., 5 FMSHRC 287, 294 (March 1983). The Commission has just now applied these principals to this very operator. Broken Hill Mining, 19 FMSHRC ____, slip op. at 5. The same approach would also appear to be applicable to size, if the operator wished to use that factor to mitigate proposed penalty amounts.

In the present matters the judge purported to enter a default judgment. However, he did not accept as fact the matters set forth in the withdrawal orders before him. Instead he took evidence and appeared to decide the validity of the orders on the merits based upon the testimony given by the inspectors. A decision on the merits requires a finding with respect to the existence of a violation as well as findings on the six criteria which section 110(i), supra, directs be considered in reaching a penalty amount. The judge did not make the necessary findings to support his affirmance of the orders. Therefore, as directed by the Commission I will make the appropriate findings.

Order No. 4003845

Order No. 4003845 charges a violation of 30 C.F.R. ' 75.902 because the ground monitor circuit to a roof bolter had been bridged out, rendering the monitor inoperative (Exh. No. 3). The inspector described the condition and how the circuit which was designed to prevent electrocutions had been intentionally defeated (Tr. 23-26, 28). Based upon the foregoing, I find a violation existed. According to the inspector if there were a default, the machine would stay energized (Tr. 29). There was a danger of fatal electrocution (Tr. 26-27, 31). Based upon the foregoing, I find the violation was serious. The inspector stated that the operator was aware of the condition since the chief electrician, a member of mine management, was present and admitted that he knew what had been done (Tr. 30). Based upon the foregoing, I find the intentional bridging out demonstrated a reckless disregard for safety and that therefore, the operator was guilty of gross negligence. Such conduct was clearly aggravated and constituted unwarrantable failure as that term has been defined by the Commission. Emery Mining Corporation , 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). Based upon data in the order, I find that there was good faith abatement. The print out of the operator=s history of prior violations shows that history is low. The record in these cases contains no information regarding the operator=s size. As already set forth, I believe that the operator bears the responsibility to produce evidence on

this factor if it is relevant to the amount of penalty. However, in this instance I take judicial notice that in a prior proceeding which was decided after hearing, the operator was found to be small. Broken Hill Mining Company, 17 FMSHRC at 345, affirmed, 19 FMSHRC ____, (April 9, 1997). I accept that finding for present purposes.

As has already been pointed out, financial information regarding the operator=s ability to continue in business is peculiarly the operator=s own. It is the operator=s duty to produce such data if it bears upon possible mitigation of the penalty amount. Even if it made sense to ask the Solicitor to come forward with such evidence, he could not do so because he would have to obtain it from the operator who has demonstrated his contempt for Commission process. And even if the Judge were to stray from his adjudicatory responsibilities by issuing on his own initiative order to produce data, his efforts would be fruitless since the operator has shown he will not comply. In a case involving other mines of this operator the Commission approved the principle that in absence of proof that the imposition of penalties would adversely affect an operator=s ability to continue in business, it is presumed that no such adverse effect would occur. Broken Hill Mining Company, 19 FMSHRC ____, (April 9, 1997); Spurlock Mining Company, supra, at 699-700; See also, Sellersburg Stone Co., supra, at 294. Although in Spurlock this operator submitted tax returns and balance sheets, the Commission still held that he failed to introduce specific evidence to show that the penalties would affect his ability to continue in business. In light of the foregoing, ability to continue in business is found to be non contributory to a determination of an appropriate penalty amount.

After careful consideration of the foregoing, I conclude that a penalty of $1,000 should be assessed.

Order No. 4004145

Order No. 4004145 charges a violation of 30 C.F.R. ' 75.603 because improper temporary splices were made in the trailing cable of a shuttle car used to transport coal (Exh. No. 8). The inspector testified that he observed a splice in the trailing cable with exposed power wires (Tr. 41-42, 45). He actually saw the metal in the power wire (Tr. 45). A splice is supposed to restore the protective nature of the outer jacket so people will not get electrocuted if they touch the cable where it was spliced (Tr. 44). In the inspector=s opinion the splice was not made in a workmanlike manner as required by the mandatory standard (Tr. 46). Based upon the foregoing, I find a violation existed. According to the inspector, the cable which supplied power to the shuttle car had 480 volts, an amount sufficient to kill or injure a miner (Tr. 42, 45). Based upon the foregoing, I find the violation was serious. The inspector testified that the operator=s chief

electrician admitted he knowingly made the improper splices, alleging he did not have the materials necessary for a proper splice (Tr. 49). Based upon the foregoing, I find that the intentional making of a defective splice demonstrated a reckless disregard for safety and that therefore, the operator was guilty of gross negligence. Such conduct was clearly aggravated and constituted unwarrantable failure as that term has been defined by the Commission. Based upon data in the order, I find there was good faith abatement. For the reasons already set forth, I find that prior history is low, the operator is small in size, and ability to continue in business is non contributory.

After careful consideration of the foregoing, I conclude that a penalty of $2,500 should be assessed.

Order No. 4017905
Order No. 4017906
Order No. 4017907

Order No. 4017905 charges a violation of 30 C.F.R. ' 75.400 because combustible materials such as loose coal spillage underneath the conveyor belt were allowed to accumulate in the Nos. 3 and 5 neutral and the No. 4 conveyor belt entries where the No. 6 conveyor belt was installed. The order recites that beginning at the conveyor belt the accumulations extended for approximately 2,000 feet inby the three named entries and that the certified foreman and belt examiner knew of the condition and had recorded it in the record book since January 3, 1994 (Exh. 9).

Order No. 4017906 charges a violation of 30 C.F.R. ' 75.400 because combustible materials such as loose coal and float coat dust were allowed to accumulate beneath the No. 5 belt in the No. 4 entry and in the Nos. 3 and 5 neutrals. The order recites that these accumulations began at the No. 5 belt drive and continue for a distance of 2,500 feet including all connecting crosscuts and that the certified foreman belt examiner knew of the condition and had recorded it in the record book since January 3, 1994 (Exh. 10).

Order No. 4017907 charges a violation of 30 C.F.R. ' 75.400 because loose coal and float coal dust were allowed to accumulate beneath the No. 4 conveyor belt in the No. 3 entry and the No. 4 neutral entry and all connecting crosscuts and extended inby to the No. 4 belt entry for a distance of approximately 400 feet (Exh. 11).

The inspector testified at the same time about these three orders. He explained that three different belts were involved in the orders (Tr. 51-52). He observed pretty much the same condition in all the areas cited in the orders (Tr. 52). At the time he traveled the belt conveyors from the underground section to the surface, the areas of the neutral entries beside the belts were

black with float coal dust and loose coal was present underneath the belts and in the belt entries (Tr. 51). Based upon the foregoing, I find the violations existed. According to the inspector, there was a hazard of mine fires and explosions (Tr. 55). The belt drives carry 480 volts of electricity and the belt is a source of heat when it is running (Tr. 55). An arc is created when the belt starter kicks in and could ignite the float coal dust that was present in or around the belt control starter box and in the neutral entries (Tr. 55-56). Extensive areas were involved in each of the orders. Based upon the foregoing, I find these violations were very serious. The inspector testified that the belt examiner/foreman admitted he had been reporting these conditions in his record book but said that due to an alleged lack of manpower the conditions were not corrected (Tr. 54). The belt examiner/foreman was a member of mine management (Tr. 54). Based upon the foregoing, I find that the intentional failure over 2**2** months to correct the cited conditions demonstrated a reckless disregard for safety and that therefore, the operator was guilty of gross negligence. Such conduct was clearly aggravated and constituted unwarrantable failure as that term has been defined by the Commission. Jim Walter Resources, Inc., 19 FMSHRC ____, slip op. at 6-10, No. SE 94-74 et al. (March 17, 1997). Based upon data in the orders, I find there was good faith abatement. For the reasons already set forth, I find that prior history is low, the operator is small in size, and ability to continue in business is non contributory.

After careful consideration of the foregoing, I conclude that penalties of $5,500 should be assessed for each of these three orders for a total of $16,500.

Order No. 3812856

Order No. 3812856 charges a violation of 30 C.F.R. ' 75.203(a) because the approved method of mining was not being complied with. Excessive widths were present in the crosscut between the No. 3 and No. 4 entries in that the crosscut was mined 23 to 27 feet wide for a distance of 18 feet. Also, pillar dimensions had been reduced in the coal pillar block between the No. 6 and No. 7 entries to a point where the pillar only measured nine feet thick. The section was being mined on 50 by 40 centers which leave 20 foot coal pillars. No additional support was installed (Exh. 12). The inspector testified that there were 33 foot widths and 20 was the maximum allowed (Tr. 63). He also said that the pillar is the most important thing in the control of the roof (Tr. 63). Based upon the foregoing, I find a violation existed. According to the inspector, the roof was real weak and especially weak in the crosscuts which were heavily traveled (Tr. 63, 66). A fatal roof fall could have occurred (Tr. 67). Based upon this testimony, I find the violation was very serious. The inspector stated that the excessive widths could have been seen by anybody and should have been apparent to the foreman who was responsible for the section (Tr. 66-67). Based upon the foregoing, I find that negligence was high and that the operator=s conduct was aggravated and constituted unwarrantable failure as that term has been defined by the Commission. Based upon data in the order, I find there was good faith abatement.

For the reasons already set forth, I find that prior history is low, the operator is small in size, and ability to continue in business in non contributory.

After careful consideration of the foregoing, I conclude that a penalty of $2,000 should be assessed.

Order No. 4012283

Order No. 4012283 charges a violation of 30 C.F.R. ' 75.202(b) because the preshift examiner traveled inby roof support while making his preshift examination. The order recites that date, time and examiner=s initials were painted inby the last row of roof supports (Exh. 14). The inspector testified that he was traveling and observed dates, times and initials placed inby roof supports (Tr. 73). Any area examined must be indicated by dates, times and initials (Tr. 74). He issued the violation for persons being beyond the last row of roof bolts (Tr. 74). Based upon the foregoing, I find a violation existed. According to the inspector, the unsupported roof could have collapsed and caused a fatality (Tr. 77). He said that going inby roof supports is the major cause of roof fatalities (Tr. 77). Based upon this testimony, I find the violation was serious. The inspector stated that the preshift examiner was the third shift maintenance foreman and that therefore, he was a representative of the operator who had the responsibility to see that such conditions did not exist with respect to anyone, much less himself (Tr. 76). Based upon the foregoing, I find that negligence was high and that the operator=s conduct was aggravated and constituted unwarrantable failure as that term has been defined by the Commission. Based upon
data in the order, I find there was good faith abatement. For the reasons already set forth, I find that prior history is low, the operator is small in size, and ability to continue in business is non contributory.

After careful consideration of the foregoing, I conclude that a penalty of $2,500 should be assessed.

Order No. 4012344

Order No. 4012344 charges a violation of 30 C.F.R. ' 75.220(a)(1) because the approved roof control plan which states that three rows of bolts must be installed before mining in a crosscut, was not being complied with. The order recites that the right crosscut had been cut 13**2** feet deep and the left crosscut also was partially cut, but that the roof had not been supported (Exh. 15). The inspector testified that the plan provides that mining could not take place in the cited area without three rows of roof bolts being installed and he described how the crosscuts had been cut (Tr. 81-82). Based upon the foregoing, I find that a violation existed. According to the inspector the roof was

very weak because it did not have the required bolts (Tr. 84). People were exposed to this roof (Tr. 82). Based upon this testimony, I find the violation was serious. The inspector also stated that the condition was apparent and should have been observed by the section foreman (Tr. 83). Based upon the foregoing, I find that negligence was high and that the operator=s conduct was aggravated and constituted unwarrantable failure as that term has been defined by the Commission. Based upon data in the order, I find there was good faith abatement. For the reasons already set forth, I find that prior history is low, the operator is small in size, and ability to continue in business is non contributory.

After careful consideration of the foregoing, I conclude that a penalty of $1,800 should be assessed.

ORDER

It is **ORDERED** that the findings of a violation for Order Nos. 4003845, 4004145, 4017905, 4017906, 4017907, 3812856, 4012283, and 4012344 be **AFFIRMED.**

It is further **ORDERED** that the unwarrantable failure findings for Order Nos. 4003845, 4004145, 4017905, 4017906, 4017907, 3812856, 4012283, and 4012344 be **AFFIRMED**.

It is further **ORDERED** that Order Nos. 4003845, 4004145, 4017905, 4017906, 4017907, 3812856, 4012283, and 4012344 issued under Section 104(d)(2) be **AFFIRMED.**

It is further **ORDERED** that penalties be **ASSESSED** as follows:

Order No.	**Penalty**
4003845	**$1,000**
4004145	**$2,500**
4017905	**$5,500**
4017906	**$5,500**
4017907	**$5,500**
3812856	**$2,000**
4012283	**$2,500**
4012344	**$1,800**

It is further **ORDERED** that the operator **PAY** the above sums, totaling $26,300, within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Hobart W. Anderson, President, Broken Hill Mining Company, Inc., P. O. Box 356, Sidney, KY 41564 (Certified Mail)