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MSHA V. B B & W COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
June 7, 1979

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. PIKE 77-89-P
 IBMA 77-67
B B & W COAL COMPANY, INC.

DECISION

This is an appeal of a decision holding the operator, B B & W Coal Company, Inc., in default in a penalty proceeding under the Federal Coal Mine Health and Safety Act of 1969.

On July 29, 1977, the Mining Enforcement and Safety Administration (MESA) filed a petition for assessment of civil penalty with the Department of Interior's Office of Hearings and Appeals (OHA), seeking a total of \$905 for 20 alleged violations. Billy McPeek, president of B B & W Coal Co., Inc., filed a pro se answer that raised certain defenses and moved that the petition be dismissed.

On October 20, 1977, Administrative Law Judge Kennedy issued a notice scheduling a hearing for November 29, 1977, along with a pretrial order requiring MESA and the operator to make various prehearing submissions. Specifically, the operator was required to submit by November 7th "a plain and concise statement ... of the reasons why each of the violations is being contested." MESA was ordered to file by November 7th a proposed stipulation regarding several factors including the statutory criteria for assessment of penalties. The pretrial order further ordered the operator to file a statement by November 21st regarding the extent of his agreement and disagreement with MESA's proposed stipulation, a statement whether

the operator claims the amount of the penalties recommended will impair its ability to continue in business, and a list of the names of witnesses it intended to use and a brief summary of the subject matter of their testimony.

On November 13th Mr. McPeck mailed to the Office of Hearings and Appeals copies of the following two documents: (1) a letter to the Solicitor, dated November 7, 1977, which includes a summary of the reasons why he would like a hearing to contest the violations in question; and (2) a letter to the Solicitor dated November 12, 1977, which stated that he was unable to agree with any points in the Solicitor's proposed stipulation. The November 12th letter further stated that the operator intended to use the inspectors who cited the alleged violations as witnesses at the hearing. These documents were received by OHA on

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November 16th. Judge Kennedy never issued a written ruling on the show cause order. However, on November 18th Judge Kennedy issued an amended notice of hearing changing the site for the November 29th hearing from Whitesburg, Kentucky to Abingdon, Virginia.

On November 22, 1977, for reasons unexplained in the record, Judge Kennedy cancelled the scheduled hearing and recused himself on grounds that he did "not believe he [could] hear and decide this matter with complete impartiality toward the respondent."

On November 28th the case was assigned to Administrative Law Judge Moore. On the following day Judge Moore entered a summary decision, in which he made the following finding: "There was no response to Judge Kennedy's order to show cause and in accordance with the procedures set forth in 43 CFR 4.544, Respondent is declared in default ..." 1/

On appeal, the operator argues that he did respond to and satisfy Judge Kennedy's order to show cause, and he notes that the hearing was scheduled to take place when Judge Kennedy recused himself.

We agree that, in the circumstances here, the operator did adequately respond to and satisfy Judge Kennedy's show cause order. Judge Kennedy apparently considered the show cause order satisfied since he transferred the hearing site to Abingdon, Virginia after receiving Mr. McPeck's response. Confusion may have occurred due to the fact that the response to Judge Kennedy's order to show cause was in the form of copies of letters to the Solicitor, but mailed to OHA, and because Judge Kennedy did not issue a written ruling on the show cause order prior to recusing himself.

The decision holding the operator in default is reversed and the case is remanded for a hearing. 2/

1/ 43 CFR 4.544(b) provided: "(b) Failure to respond to prehearing order. Where the respondent fails to file a response to a prehearing order the administrative law judge may issue an order to show cause why the operator should not be considered in default and the case disposed of in accordance with paragraph (a) of this section."

2/ Remand for hearing is the appropriate remedy, not, as requested by the operator, a dismissal of the penalty proceedings.