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MSHA V. LINCOLN SAND AND GRAVEL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
February 8, 1989

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

v. Docket No. LAKE 88-67-M

LINCOLN SAND AND GRAVEL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION
BY THE COMMISSION:

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq (1982), involves three citations issued to Lincoln Sand and Gravel Company ("Lincoln") alleging violations of mandatory safety standards. Following proper notice, a hearing on the merits was held in St. Louis, Missouri on July 25, 1988. Lincoln failed to appear at the hearing. In his decision issued December 8, 1988, Administrative Law Judge Roy J. Maurer determined that Lincoln violated the mandatory safety standards as alleged in the citations and assessed civil penalties totalling \$168. 10 FMSHRC 1679 (December 1988)(ALJ). We granted Lincoln's petition for discretionary review and stayed briefing. Upon consideration of the full record, we have determined that briefs are not necessary for the resolution of this case. For the reasons that follow, we affirm the judge's decision.

Lincoln is proceeding in this case without the benefit of counsel. In response to the Chief Administrative Law Judge's Order to Respondent to Show Cause why it failed to file an answer to the Secretary of Labor's Proposal for a Penalty, Lincoln replied, by letter mailed on June 2, 1988, that it had not received the

Proposal for a Penalty and it requested a hearing. By notice of July 1, 1988, Judge Maurer set the hearing for 8:00 a.m., July 25, 1988, in St. Louis, Missouri. The record reveals that approximately one week prior to hearing, Lincoln, by telephone, requested a later hearing date. Tr. 3. The administrative law judge agreed to delay the hearing until 10:30 a.m. on the same date. Tr. 3; 10 FMSHRC at 1681. When Lincoln failed to appear by 10:30 a.m., the attorney representing the Secretary of Labor called Lincoln and was told by the office manager that no representative from Lincoln would be attending the hearing. Tr. 3-4; 10 FMSHRC at 1681. The Secretary presented evidence as to each citation and the hearing was closed at 11:15 a.m. The judge affirmed each citation in his written decision.

In its petition for discretionary review Lincoln first contends that Paul Orr, Vice-President of Lincoln, called Judge Maurer after receipt of the notice of hearing to request that the hearing be held in Lincoln, Illinois. Lincoln also alleges that Orr called the judge's office on the Wednesday or Thursday prior to the hearing and, in the judge's absence, informed the judge's secretary that he would not be able to attend the hearing and asked that the hearing be delayed. By implication, Lincoln argues that the judge's failure to grant these requests was unreasonable. We disagree. Lincoln did not request any particular hearing site or date in its June 2 written request for a hearing. Rule 51 of the Commission's Procedural Rules, 29 C.F.R. § 2700.51 provides:

All cases will be assigned a hearing site by order of the Judge, who shall give due regard to the convenience and necessity of the parties or their representatives and witnesses, the availability of suitable hearing facilities, and other relevant factors.

This Rule was derived from section 5(a) of the Administrative Procedure Act, 5 U.S.C. § 554(b), which states: "In fixing the times and places for hearings due regard shall be had for the convenience and necessity of the parties or their representatives." Judge Maurer, in accordance with Rule 51, reasonably set the hearing for St. Louis, Missouri, a city located less than 150 miles from the mine. Compare, *Cut Slate, Incorporated*, 1 FMSHRC 796 (1979)(administrative law judge abused his discretion by requiring a small quarry operator to attend a prehearing conference at a site about 450 miles from the operator's mine).

The notice of hearing setting forth the date, time and place of hearing was issued to Lincoln 24 days prior to the hearing date. See Procedural Rule 53, 29 C.F.R. § 2700.53. During his telephone conversation with Orr, the judge agreed, in response to Orr's request, to start the hearing two hours later on the scheduled hearing date. Tr. 3; 10 FMSHRC at 1681. Nothing in the record suggests that Orr objected to this resolution of his requests. Orr's alleged phone call to the judge's secretary requesting a further delay is not reflected in the record. */ In addition, Lincoln did not set forth any reasons to support the requested additional delay. For the foregoing reasons, we conclude that the judge complied with the requirements of the Mine Act and the Commission's Procedural Rules in setting this case for hearing.

Lincoln also challenges the judge's findings that it violated

the mandatory safety standards alleged in the citations. We have reviewed the record and conclude that the judge's findings of violation are supported by

*/ We previously have noted "the risk of possible misunderstandings, conflicting interpretations, and differing recollections, resulting from ... telephonic [,rather than written,] communications...."
Inverness Mining Co., 5 FMSHRC 1384. 1388 n. 3 (August 1983).

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substantial evidence. 30 U.S.C. 823(d)(2)(A)(ii)(1). Lincoln makes other allegations in its petition for review that do not raise issues under the Mine Act and are not appropriately addressed in this decision.

For the foregoing reasons, the judge's decision is affirmed.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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