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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

Civil Penalty Proceeding
Docket No. PIKE 79-29-P
Assessment Control
No. 15-10331-03001

v.

FLAT TOP MINING, INC.,
RESPONDENT

No. 6 Surface Mine

DEFAULT DECISION

Apperances: John H. O'Donnell, Esq., Office of the Solicitor,
Department of Labor, for Petitioner
No one appeared at the hearing on behalf of Respondent

Before : Administrative Law Judge Steffey

When the hearing in the above-entitled proceeding was convened in Pikeville, Kentucky, on August 10, 1979, pursuant to a written notice of hearing dated June 19, 1979, and received by respondent on June 29, 1979, counsel for the Mine Safety and Health Administration entered his appearance, but no one appeared at the hearing to represent respondent.

Section 2700.63(a) of the Commission's Rules of Procedure which became effective on July 30, 1979, provides that when a party fails to comply with an order of a judge, an order to show cause shall be directed to the party before the entry of any order of default. An order to show cause was sent to respondent on August 14, 1979, pursuant to 29 CFR 2700.63(a). Respondent filed on August 30, 1979, a reply to the show-cause order stating that it had overlooked the hearing date because of some personnel changes. Respondent concluded that it was at fault in failing to appear at the hearing and submitted a check in the amount of \$1,465.00 which was the total of the civil penalties proposed by the Assessment Office for the seven violations alleged in MSHA's Petition for Assessment of Civil Penalty.

At the hearing, the inspector who wrote the citations which support MSHA's Petition for Assessment of Civil Penalty testified that Citation No. 72833 which he issued on March 15, 1978, alleging a violation of 30 CFR 77.1302(a) had been issued in error. At the time Citation No. 72833 was issued, it was MSHA's policy to cite a violation of Section 77.1302(a) if a vehicle used to haul blasting agents lacked a non-sparking lining inside the space used to haul blasting agents. The inspector stated that subsequent to March 15, 1978, MSHA changed its interpretation of Section 77.1302(a) to permit the transportation of

~1411

MSHA v. Flat Top, Docket No. PIKE 79-29-P (Contd.)

blasting agents, as opposed to actual explosives, in an unlined compartment. The inspector stated that he believed Citation No. 72833 should be vacated because it had alleged a violation of Section 77.1302(a) under a factual situation which is no longer considered to be a violation of Section 77.1302(a) (Tr. 8-10).

The inspector's vacation of Citation No. 72833 had the effect of making it unnecessary for respondent to pay the penalty of \$345.00 which had been proposed by the Assessment Office for the violation of Section 77.1302(a). I have discussed respondent's overpayment with an employee who works in the Assessment Office and he has indicated that respondent's payment of \$345.00 with respect to Citation No. 72833 will be refunded. Therefore, the order accompanying this decision will dismiss MSHA's Petition to the extent that it seeks assessment of a penalty for an alleged violation of Section 77.1302(a) with respect to Citation No. 72833. The order will also recognize that penalties totaling \$1,120.00 proposed by the Assessment Office for the remaining six violations have already been paid by respondent.

I find respondent to be in default for failure to appear at the hearing held on August 10, 1979. Section 2700.63(b) of the Commission's Rules of Procedure provides that if a judge finds a respondent to be in default, he shall enter a summary order assessing the proposed penalties as final.

WHEREFORE, it is ordered:

(A) For the reasons given above, MSHA's Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-29-P is dismissed to the extent that it seeks assessment of a civil penalty for a violation of 30 CFR 77.1302(a) with respect to Citation No. 72833.

(B) If the penalty of \$345.00 proposed by the Assessment Office for the violation of Section 77.1302(a) referred to in paragraph (A) above, has not already been refunded to respondent, that amount should be refunded within 30 days from the date of this decision.

(C) Respondent's obligation to pay civil penalties totaling \$1,120.00 has already been satisfied by its submission on August 20, 1979, of Check No. 4604 dated August 28, 1979, in the amount of \$1,465.00, of which \$345.00 has been or will be refunded.

~1412

MSHA v. Flat Top, Docket No. PIKE 79-29-P

The penalties totaling \$1,120.00 which respondent has already paid are allocated to the respective violations as follows:

Citation No. 72821	3/13/78	77.1606(c)	.....	\$	160.00
Citation No. 72824	3/13/78	77.1605(a)	.....		140.00
Citation No. 72825	3/13/78	77.1110	.....		140.00
Citation No. 72829	3/13/78	77.1302(f)	.....		305.00
Citation No. 72831	3/15/78	77.1301(b)	.....		195.00
Citation No. 72832	3/15/78	77.1301(c)(9)	.....		180.00
Total Penalties in This Proceeding					\$1,120.00

Richard C. Steffey
Administrative Law Judge