

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

December 18, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-33
Petitioner	:	A. C. No. 46-08066-03503
v.	:	
	:	Seng Camp 1-A
EMPIRE ENERGY, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-34
Petitioner	:	A. C. No. 46-08066-03503
v.	:	
	:	Seng Camp 1-A
WAR EAGLE CONSTRUCTION	:	
CORPORATION,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-35
Petitioner	:	A. C. No. 46-08066-03503
v.	:	
	:	Seng Camp 1-A
KENNIE COMPTON,	:	
Respondent	:	

DEFAULT DECISION

Before: Judge Maurer

These cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor; acting through his Mine Safety and Health Administration (MSHA), against Empire Energy, Inc., War Eagle Construction, and Kennie Compton, personally pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 11 violations of the Secretary's mandatory health and safety standards and seek penalties of \$135,000 from each respondent. For the reasons set forth below, I find the respondents in default, affirm the orders and citations, and assess penalties of

\$135,000 against each of the respondents.

On June 7, 1994, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the respondents. On August 13, 1996, counsel filed a Motion to Compel stating that although respondents had received the discovery requests, no response to them had been made. Consequently, the Secretary requested that the respondents be compelled to respond to the requests and that if the respondents did not respond to the requests a default decision be issued in the proceedings. Respondents did not respond to the Motion to Compel.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on September 17, 1996. Respondents were ordered to respond to the Secretary's discovery requests within 15 days of the date of the order. The respondents were further cautioned that "[f]ailure to respond will result in the issuance of an Order of Default, **without the issuance of a prior Order to Show Cause.**

The order was sent by Certified Mail-Return Receipt Requested to respondents. The Return Receipt Card has been received from Kennie Compton indicating that the order was received on September 21, 1996. The envelopes addressed to Empire Energy, Inc. and War Eagle Construction were returned marked unclaimed.

On November 22, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the respondents had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Respondents have not responded to the motion.

Commission Rule 59, 29 C.F.R. § 2700.59, states that "[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate" Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen 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 or dismissal."

In view of the respondents' consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the respondents in the order compelling

discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The respondents' subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's

motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

ORDER

Based on the above, I find the respondents, Empire Energy, Inc., War Eagle Construction, and Kennie Compton in default in these cases. Accordingly, all citations/orders contained in the captioned dockets are **AFFIRMED**. Empire Energy, Inc., War Eagle Construction, and Kennie Compton are each **ORDERED TO PAY** civil penalties of \$135,000 within 30 days of the date of this decision. Upon receipt of payment, these proceedings are **DISMISSED**.

Roy J. Maurer
Administrative Law Judge

Distribution:

Pamela S. Silverman, Esq., Office of the Solicitor,
U. S. Department of Labor, 4015 Wilson Boulevard, Suite 516,
Arlington, VA 22203 (Certified Mail)

Empire Energy, Inc., P. O. Box 329, Mallory, WV 25634 (Certified Mail)

War Eagle Construction Corporation, P. O. Box 691, Gilbert, WV 25621 (Certified Mail)

Mr. Kennie Compton, 107 Timberide Drive, Beckley, WV 25801
(Certified Mail)

dcp