

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 9, 1988

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

v.

MIDDLE STATES RESOURCES,
INCORPORATED

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Docket No. WEVA 88-154

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). On August 15, 1988, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent Middle States Resources, Inc. ("MSR") in default for failure to answer the Secretary of Labor's civil penalty complaint and the judge's subsequent order to show cause. The judge assessed a civil penalty of \$444 proposed by the Secretary. By letter dated August 26, 1988, addressed to Judge Merlin, MSR asserted that it had filed its "Blue Card" request for a hearing in this matter and had not received the judge's show cause order. We deem MSR's August 26 letter to constitute a timely petition for discretionary review of the judge's default order. See, e.g., Mohave Concrete & Materials, Inc., 8 FMSHRC 1646 (November 1986). We grant the petition and summarily remand this matter to the judge for further proceedings.

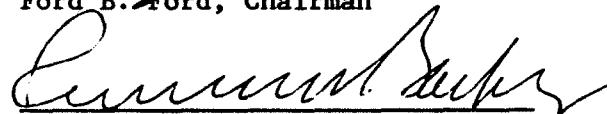
It appears from the record that MSR, a small operator acting pro se, did file a Blue Card request for a hearing in this matter in response to the Secretary's initial notification of proposed penalty. However, MSR did not file an answer to the Secretary's subsequent civil penalty complaint, as it was required to do in order to maintain its contest of that penalty proposal. See 29 C.F.R. §2700.28. Accordingly, on June 9, 1988, Judge Merlin issued an Order to Respondent to Show Cause directing it to file the answer or be found in default. MSR did not respond to the show cause order. MSR has alleged in its August 26 letter that, because of a change in corporate agent and because correspondence was addressed to the former agent, it did not receive the show cause order. The official file indicates that the show cause order may not have been delivered to or received by MSR. MSR also asserts that it notified the Department of Labor's Mine Safety and Health

Administration of the change in its agent.


In a case involving a similar situation, the Commission held that "under appropriate circumstances a genuine problem in communication or with the mail may justify relief from default." Con-Ag, Inc., 9 FMSHRC 989, 990 (June 1987). Upon consideration of the record and MSR's request for relief from default, we conclude that MSR should be afforded the opportunity to raise these issues with the judge, who shall determine whether relief from default is appropriate. Cf. Kelley Trucking Co., 8 FMSHRC 1867, 1869 (December 1986).

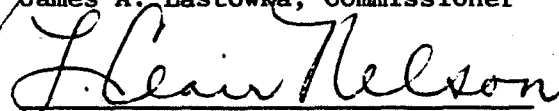
Accordingly, the judge's default order is vacated and this matter in remanded for proceedings consistent with this order.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

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