

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
**1730 K STREET, N.W., 6<sup>TH</sup> FLOOR**  
**WASHINGTON, D.C. 20006-3868**

January 19, 1999

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-196-M
Petitioner	:	A. C. No. 03-01735-05512
	:	
v.	:	
J & J SAND AND GRAVEL,	:	J & J Sand & Gravel
Respondent	:	

**ORDER VACATING DEFAULT**  
**ORDER OF ASSIGNMENT**

**Before: Judge Merlin**

On December 14, 1998, an order of default was issued in the above-captioned case directing the operator to pay the proposed penalties immediately because it failed to file an answer to the Secretary's penalty petition.

On December 29, 1998, the Solicitor filed a notice of response by the respondent advising that the operator had filed an answer with his office on August 12, 1998. The Solicitor enclosed the answer he received from the operator which is dated August 5, 1998, and is addressed to the Commission. The Solicitor maintains that the default in this case is appropriate because the operator failed to respond to the show cause order issued on October 19, 1998.

Under Commission precedent, a problem in communication or with the mail may justify relief from default. Con-Ag, Inc., 9 FMSHRC 989, 990 (June 1987); United Rock Products Corp., 14 FMSHRC 79 (January 1992); Lynx Coal Company, 15 FMSHRC 979 (June 1993); AMI Construction, 16 FMSHRC 670 (April 1994); Sandy Jones Construction, 16 FMSHRC 2375 (December 1994). It appears that such a problem occurred in this case. Furthermore, the operator's August 5 answer was a timely response to the penalty petition which was filed on August 3, 1998. Consequently, the October 19 show cause order should not have been issued in the first place. I reject the Solicitor's argument that default is warranted because the operator did not respond to the show cause order. Failure to respond to an order that was erroneously issued is not grounds for a default. Indeed, if the Solicitor had timely advised the Commission of the operator's answer, no show cause would have been issued. Therefore, I find that relief from the default is warranted.

In light of the foregoing, the December 14 order of default issued in this case is hereby **VACATED**.

This case is hereby assigned to Administrative Law Judge David Barbour.

All future communications regarding this case should be addressed to Judge Barbour at the following address:

Federal Mine Safety and Health  
Review Commission  
Office of Administrative Law Judges  
Two Skyline Place, Suite 1000  
5203 Leesburg Pike  
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Paul Merlin  
Chief Administrative Law Judge

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