

CCASE:
MSHA V. CON-AG
DDATE:
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TTEXT:

FMSHRC-WDC
June 30, 1987

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

v. Docket No. LAKE 87-15-M

CON-AG, INCORPORATED

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

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commission Chief Administrative Law Judge Paul Merlin pursuant to Commission Procedural Rule 63, 29 C.F.R. § 2700.63, issued an Order of Default on June 1, 1987, finding Con-Ag, Inc. ("Con-Ag") in default and assessing a civil penalty of \$550. On June 15, 1987, the Commission received from Con-Ag a written request for relief from this default. We deem the request to constitute a timely petition for discretionary review. For the reasons that follow, we vacate the judge's default order and remand for further proceedings.

On May 14, 1986, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Con-Ag a citation in connection with an accident at Con-Ag's crushing plant alleging a violation of 30 C.F.R. § 56.15005 based on a miner's failure to wear a safety belt and line. On November 28, 1986, Con-Ag filed a "Blue Card" request for hearing with respect to the Secretary of Labor's notification of a proposed \$550 civil penalty for the alleged violation. On January 22, 1987, the Secretary filed a Proposal for Penalty with the Commission. Con-Ag did not file an

answer to the penalty proposal. Consequently, on March 13, 1987, Judge Merlin issued an Order to Show Cause directing Con-Ag to file an answer within thirty days. Con-Ag did not respond to this order.

The show cause order was sent by certified mail to the Wapakoneta, Ohio address that Con-Ag was using at the time of citation. The order was returned undelivered on March 20, 1987, stamped by the United States

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Postal Service "Attempted-Not Known." On June 1, 1987, Judge Merlin issued an Order of Default finding Con-Ag in default and assessing the Secretary's proposed \$550 penalty. The judge's order states: "On March 13, 1987, you were ordered to file your Answer to the Proposal.... The Order was returned unclaimed. Under the Commission's regulations service is complete upon mailing." The default order was sent by certified mail to Con-Ag at the same Wapakoneta, Ohio address.

On June 15, 1987, Con-Ag filed with the Commission a notarized letter signed by Lee Kuck requesting relief from default. Kuck attached to his letter an MSHA change-of-address form providing MSHA with a new address for Con-Ag in St. Marys, Ohio. It appears that this form may have been sent to MSHA on May 29, 1986, a few weeks after the citation was issued and nearly one year prior to the judge's show cause order. Kuck also states that he checked with the Wapakoneta Post Office and was told that the show cause order was returned to the sender "because of improper address." Kuck requests a hearing "due to the fact the address was incorrect, and the fact that MSHA had the correct address."

The Commission has recognized that under appropriate circumstances a genuine problem in communication or with the mail may justify relief from default. See, e.g., Kelley Trucking Co., 8 FMSHRC 1867, 1869 (December 1986; Fife Rock Prod. Co., Inc., 8 FMSHRC 1503, 1504 (October 1986). The record does not contain sufficient information to justify our ruling summarily on Con-Ag's claims. In fairness and consistent with Commission precedent in default cases the operator should have the opportunity to present its position to the judge, who shall determine whether relief from default is appropriate. Kelley Trucking, supra.

For the foregoing reasons, the judge's default order is vacated and this matter is remanded for further proceedings consistent with this opinion.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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