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MSHA V. EL PASO SAND PRODUCTS  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, DC  
August 19, 1988

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

v. Docket No. CENT 88-53-M

EL PASO SAND PRODUCTS, INC.

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka 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 July 11, 1988, Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent El Paso Sand Products, Inc. ("El Paso"), in default for failure to answer the Secretary of Labor's civil penalty complaint and the judge's subsequent order to show cause and assessing a civil penalty of \$345 proposed by the Secretary. By letter dated July 19, 1988, addressed to Judge Merlin, El Paso asserted that it had previously responded in writing to the Secretary's civil penalty complaint and, apparently, the show cause order as well. Copies of these responses, attached to the July 19 letter, reflect that they were sent to the Secretary of Labor's Dallas, Texas, Solicitor's Office rather than to this independent Commission. We deem El Paso's July 19 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 El Paso, acting pro se, attempted to file timely written responses to the Secretary's civil penalty complaint and the judge's show cause order. Although these documents were apparently sent to the Secretary's Solicitor's Office and were not filed with the Commission, as required, El Paso may have been attempting, in good faith, to comply with its filing responsibilities .. a factor that may justify relief from default. See, e.g., Upright Mining, Inc., 9 FMSHRC 206, 207 (February 1987). Under these circumstances, we conclude that El Paso should be afforded the opportunity to explain its filing attempts to the judge, who shall determine whether relief from default is appropriate. Cf. Kelley Trucking Co., 8 FMSHRC 1867, 1869 (December 1986).

For the foregoing reasons, the judge's default order is vacated and this matter is remanded for proceedings consistent with this order. El Paso's attention is directed to the requirements that all further pleadings and papers in this proceeding must be filed with the Commission and copies of all such documents served on the Secretary of Labor. 29 C.F.R. §§ 2700.5(b) & .7. 1/

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1/ Commission Procedural Rule 5(b) states:

Where to file. Until a Judge has been assigned to a case, all documents shall be filed with the Commission. After a Judge has been assigned, and before he issues a decision, documents shall be filed with the Judge, except for documents filed in connection with interlocutory review, which shall be filed with the Commission. After the Judge has issued his decision, documents shall be filed with the Commission. Documents filed with the Commission shall be addressed to the Executive Director and mailed or delivered to the Docket Office, Federal Mine Safety and Health Review Commission, 1730 K. Street, N.W., Sixth Floor, Washington, D.C. 20006.

29 C.F.R. § 2700.5(b).

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Distribution

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