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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
September 15, 1988

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

v. Docket No. WEVA 88-136

TEN-A COAL COMPANY

BEFORE: 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 Ten-A Coal Company ("Ten-A") 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 \$504 proposed by the Secretary. By letter dated August 29, 1988, addressed to Judge Merlin, Ten-A asserted that it had filed its "Blue Card" request for a hearing in this matter and had "never received any papers on this" until it received the default order. We deem Ten-A's August 29 letter, received by the Commission on August 31 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 Ten-A, a relatively small

operator acting without counsel, did file a Blue Card request for a hearing in this matter in response to the Secretary's initial notification of proposed penalty. However, Ten A 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 Ten-A to file an answer or be found in default. Ten A did not respond to the show cause order. Ten-A has alleged that it "never received any papers on this" following its filing of the Blue Card and prior to receipt of the default order.

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The record reflects that the Secretary's penalty proposal was served by first class mail on Ten-A at its proper address. The record also shows that the judge's show cause order was mailed to Ten-A on June 9, 1988, by certified mail, return receipt requested, at the proper address, attention of Patrick H. Cunningham, Partner. The record contains the certified mail return receipt for that mailing, signed on June 14, 1988, by one Frank Cunningham. The Commission has recently noted that "under appropriate circumstances a genuine problem in communication or with the mail may justify relief from default." *Middle States Resources, Inc.*, 10 FMSHRC , No. WEVA 88-154, slip op. at 2 (September 9, 1988), quoting *Con-Ag, Inc.*, 9 FMSHRC 989, 990 (June 1987)(emphasis added). The record does not contain sufficient information to permit us to rule with respect to Ten-A's claims, but we remand this matter to the judge, who shall afford Ten-A the opportunity to present its explanation. The judge shall determine whether relief from default is appropriate under the circumstances presented. Cf. *Perry Drilling Co.*, 9 FMSHRC 377, 380 (March 1987).

Accordingly, the judge's default order is vacated and this matter is remanded for proceedings consistent with this order. Ten-A is reminded to serve the Secretary of Labor with copies of all its correspondence and other filings in this matter. 29 C.F.R. § 2700.7.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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