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MSHA V. O'NEAL MACHINE & REPAIR  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
November 8, 1989

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

v. Docket No. WEVA 89-150

O'NEAL MACHINE & REPAIR, INC.

BEFORE: Ford, Chairman; Backley, Doyle, and Lastowka, 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 September 20, 1989, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding O'Neal Machine & Repair, Inc. ("O'Neal") in default for failure to answer the Secretary of Labor's Petition for Assessment of Civil Penalty and the judge's Order to Show Cause. The judge assessed a civil penalty of \$5,300, the amount proposed in the Secretary's penalty petition. By letter to the Secretary of Labor dated September 25, 1989, O'Neal asserted that it had previously sent to the Department of Labor's Mine Safety and Health Administration ("MSHA"), within the time permitted for answering a penalty proposal, a written "reply to the penalties assessed against us." A copy of a certified mail return receipt, enclosed with O'Neal's September 25 letter, indicates that its May 11, 1989, reply was received in MSHA's Arlington, Virginia offices on May 15, 1989. O'Neal's September 25 correspondence was subsequently forwarded to the Commission by the Secretary. We deem O'Neal's September 25 letter to constitute a request for review. See, e.g., L&L Gravel, 11 FMSHRC 803-04 (May 1989). For the reasons discussed below, we reopen this proceeding, grant O'Neal's request for review, vacate the judge's default order, and remand for further proceedings.

It appears from the record that O'Neal, acting pro se, attempted to file its answer to the Secretary's civil penalty petition within the 30-day period of time prescribed for replying to a penalty proposal (see 29 C.F.R. 2700.28). Although the document was mistakenly sent to MSHA, and was not filed with this Commission, an adjudicatory agency separate and independent from the Department of Labor and MSHA, as required (see 29 C.F.R. 2700.5(b) & .28), O'Neal appears to have been attempting in good faith to comply with its filing responsibilities.

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Under the circumstances, we conclude that O'Neal should be afforded the opportunity to explain its filing attempts to the judge, who shall determine whether final relief from default is appropriate. See. e.g., El Paso Sand Products, Inc., 10 FMSHRC 960 (August 1988).

For the foregoing reasons, we vacate the judge's default order and remand this matter for further proceedings. O'Neal's attention is directed to the requirement that all further papers submitted 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. \*/

Joyce A. Doyle, Commissioner

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\*/ Commission Procedural Rule 5(b) states:

Where to file. Until the 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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