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MSHA V. A. H. SMITH STONE  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
November 20, 1989

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

v. Docket No. YORK 89-46-M

A. H. SMITH STONE COMPANY

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 October 24, 1989, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent A.H. Smith ("Smith") 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 civil penalties of \$1,903, as proposed by the Secretary. By letter dated November 2, 1989, addressed to Judge Merlin, Smith asserted that the order to show cause had been misfiled and therefore overlooked. We deem Smith's November 2 letter to constitute a timely petition for discretionary review of the judge's default order. See e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988); Mohave Concrete & Materials, Inc., 8 FMSHRC 1646 (November 1986). We grant the petition and summarily remand this matter to the judge for further consideration.

It appears from the record that Smith, proceeding without benefit of counsel, may have raised a colorable excuse for its non-response to the judge's order. See e.g., Columbia Portland Cement Co., 8 FMSHRC 1644 (November 1986)(non-response attributable to mistake or neglect of

a former employee); Mohave Concrete, 8 FMSHRC at 1646 (failure to respond attributable to mistake or neglect of a former bookkeeper). The Commission has previously afforded such a party relief from final orders of the Commission where it appears that the party's failure to respond to a judge's order and the party's subsequent default are due to inadvertence, mistake, or excusable neglect. Amber Coal Co., 11 FMSHRC

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131, 132 (February 1989); Kelley Trucking Co., 8 FMSHRC 1867 (December 1986); M.M. Sundt Construction Co., 8 FMSHRC 1269 (September 1986).

Under these circumstances, we will accept Smith's letter as a petition for discretionary review and grant the petition.

Since we are unable, on the basis of the present record, to evaluate the merits of Smith's assertion in this case, we will permit Smith to present its position to the judge, who will determine whether sufficient grounds exist for excusing Smith's failure to timely respond. Perry Drilling Co., 9 FMSHRC 377, 380 (March 1987), citing Kelley, supra, 8 FMSHRC at 1869.

Accordingly, the judge's default order is vacated and this matter is remanded for proceedings consistent with this order.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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