

CCASE:
SOL (MSHA) V. MARTIN SALES & PROCESSING
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April 22, 1993

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | Docket Nos. WEVA 92-1008 |
| | : | WEVA 92-1096 |
| v. | : | WEVA 92-1097 |
| | : | WEVA 92-1108 |
| MARTIN SALES & PROCESSING | : | |

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, Commissioners

ORDER

BY THE COMMISSION:

In these civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)(the "Mine Act"), Commission Administrative Law Judge George Koutras issued Summary Default Decisions ("default decision") on March 29, 1993, finding respondent Martin Sales & Processing ("Martin") in default for failing to respond to discovery requests served by the Secretary of Labor and to the judge's February 25, 1993, order to show cause. The judge assessed civil penalties of \$32,166 as proposed by the Secretary. For the reasons that follow, we vacate the default order and remand this case for further proceedings.

The judge's jurisdiction over this case terminated when his decision was issued on March 29, 1993. 29 C.F.R. 2700.65(c). On April 8, 1993, the judge received from Martin's attorney a Motion to Alter, Vacate, or Amend the default decision. Martin asserts that it had timely filed a response, dated March 8, 1993, to the judge's show cause order. Martin does not assert that it mailed the response by certified or registered mail, return receipt requested, and the Commission's records do not indicate receipt of Martin's response to the show cause order.

Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review with the Commission within 30 days of the decision. 30 U.S.C. 823(d)(2); 29 C.F.R. 2700.70(a). We will treat Martin's motion as a timely filed petition for discretionary review of the decision. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

It appears that Martin may have attempted to respond to the judge's show cause order. The Commission has noted "under appropriate circumstances a

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genuine problem in communication or with the mail may justify relief from default." Middle States Resources, Inc., 10 FMSHRC at 1131, quoting Con-Ag, Inc., 9 FMSHRC 989, 990 (June 1987). We are unable, however, to evaluate the merits of Martin's explanation on the basis of the present record. We will afford Martin the opportunity to present its position to the judge, who shall determine whether default is warranted.

Accordingly, we grant Martin's petition for discretionary review, vacate the judge's default decision, and remand this matter for proceedings consistent with this order.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner