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MSHA V. PATRIOT COAL
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FMSHRC-WDC
March 20, 1987

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

v. Docket No. WEVA 86-400

PATRIOT COAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on February 11, 1987, finding Patriot Coal Company ("Patriot") in default for failure to respond to a show cause order. The judge assessed a civil penalty of \$250. For the reasons that follow, we vacate the default order and remand the case for further proceedings.

On March 3, 1987, Patriot's general manager wrote a letter to Judge Merlin requesting that the judge review his decision in light of its answer, attached to the letter. The attachment, a letter from Patriot's president dated January 5, 1987, and addressed to the Department of Labor's Regional Solicitor in Philadelphia, contains a short and plain statement of the reasons why Patriot disagrees with a backup alarm violation alleged by the Secretary. Patriot's March 3 letter was received by the Commission on March 9, 1987.

The judge's jurisdiction over the case terminated when his decision was issued. 29 C.F.R. § 2700.65(c). We are treating Patriot's letter requesting review of the judge's order as a timely

petition for discretionary review because it was received within 30 days of the judge's decision. 29 C.F.R. § 2700.70(a). The petition is granted.

The record discloses that on April 16, 1986, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to Patriot alleging a violation of 30 C.F.R. § 77.410 for failure to equip a parts truck with an automatic warning device. Upon preliminary notification by MSHA of the civil penalty proposed for the alleged violation, Patriot filed a "Blue Card" request for a hearing before this independent Commission. On August 25, 1986, counsel for the

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Secretary served Patriot with the Secretary's penalty proposal. When no answer to the penalty proposal was filed, the judge, on November 18, 1986, issued a show cause order directing Patriot to file an answer within 30 days or show good reason for the failure to do so. As noted, Patriot's president served an answer on the Secretary by mail on January 5, 1987. Other than as an attachment to Patriot's March 3 letter, the Commission's official record does not contain a copy of the answer. Under the Commission's rules of procedure, the party against whom a penalty is sought must file an answer with the Commission within 30 days after service of the proposal for penalty. 29 C.F.R. § 2700.5(b) & .28.

Patriot's March 3 letter also mentions a thirty-day extension of time in which to answer, which it states it requested and was granted. Again, the Commission's official record contains no documentation that such a request was made or granted.

Patriot has not provided any explanation for its failure to file a timely answer or for its failure to timely respond to the judge's show cause order. However, we note that Patriot is proceeding pro se, that it did serve the Secretary with its answer prior to issuance of the judge's default order, and did bring the existence of a possible excuse to the attention of the Commission. In light of these factors, we believe that the operator should have the opportunity to present its position to the judge.

For the foregoing reasons, the judge's default order is vacated and the matter is remanded to the judge, who shall determine whether relief from default is appropriate. See, e.g., *Kelley Trucking Co.*, 8 FMSHRC 1867, 1869 (December 1986).

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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