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MSHA V. WESTMORELAND COAL  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
March 1, 1989

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

v. Docket No. VA 89-17

WESTMORELAND 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 Administrative Law Judge William Fauver issued a Decision Approving Settlement on February 3, 1989. After noting that Westmoreland Coal Company ("Westmoreland") had paid the civil penalty proposed for the violation in issue, the judge granted a dismissal request from the Secretary of Labor and dismissed the proceeding. Subsequently, the judge received from counsel for Westmoreland letters stating that Westmoreland had mistakenly paid the civil penalty and requesting, in effect, that the judge's decision be vacated and the matter be reopened for further proceedings. We deem these letters to constitute a petition for discretionary review and, for the following reasons, we vacate the judge's decision and remand for further proceedings.

On November 9, 1988, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Westmoreland, at its Prescott No. 2 underground coal mine, a citation pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), alleging a violation of

mandatory safety standard 30 C.F.R. § 75.203. 1/ On December 16, 1988,

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1/ Section 75.203(a), a mandatory safety standard for underground coal mines, provides:

The method of mining shall not expose any person to hazards caused by excessive widths of rooms,

~276

the Secretary filed with the Commission a Petition for Assessment of Civil Penalty proposing an \$85 penalty for the alleged violation. Westmoreland subsequently filed an Answer contesting the penalty and underlying violation. The matter was assigned to Judge Fauver, who issued a Prehearing Order on January 26, 1989, directing the parties to confer by February 21, 1989, for the purposes of discussing any possible settlement or stipulations.

By letter to Chief Administrative Law Judge Paul Merlin, dated January 26, 1989, and received by the Commission on January 30, 1989, counsel for the Secretary stated:

The operator in this case has paid the full amount of the penalty that was assessed, \$85. As far as we are concerned, the case may now be dismissed.

On February 3, 1989 Judge Fauver issued his decision dismissing the case. He stated: "Petitioner has moved to dismiss the case based upon full payment of the proposed civil penalty. I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the criteria in § 110(i) of the Act."

By letters to Judge Fauver dated February 1 and February 7, 1989, and received by the Commission on February 3 and February 9, respectively, counsel for Westmoreland stated that the civil penalty in question had been paid in error and requested that the matter not be dismissed and remain on the Commission's docket.

The judge's jurisdiction in this matter terminated when his decision issued on February 3, 1989. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a judge's decision has issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2)(A)(i), 29 C.F.R. 2700.70(a). Here, Westmoreland's letters are a request for relief from the judge's decision, and we will treat them as a petition for discretionary review.

A civil penalty under the Mine Act is predicated upon the existence of a violation. An operator cannot deny the existence of a violation for purposes connected with the Mine Act and at the same time pay a civil penalty. Therefore, the Commission has held that an operator's payment of a civil penalty proposed for a violation extinguishes the operator's right to contest the fact of violation.

Old Ben Coal Co., 7 FMSHRC 205, 209 (February 1985). The Commission has also expressly noted, however, that where a civil penalty has been paid by genuine mistake, the operator's right to contest the violation may not be lost. Old Ben Coal Co., 7 FMSHRC at 210 n.6.

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crosscuts and entries, or faulty pillar recovery methods. Pillar dimensions shall be compatible with effective control of the roof, face and ribs and coal or rock bursts.

~277

The record does not contain sufficient information to permit us to determine whether Westmoreland's penalty payment was a "genuine mistake." Further proceedings may be necessary to address Westmoreland's assertions and for the judge to determine what relief, if any, is appropriate.

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

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

Clair Nelson, Commissioner