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MSHA V. CAMP FORK FUEL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
April 7, 1989

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

v. Docket No. KENT 88-178

CAMP FORK FUEL COMPANY

BEFORE: Ford, Chairman; Doyle and Lastowka, Commissioners

DIRECTION FOR REVIEW AND 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) ("Mine Act"). Commission Chief Administrative Law Judge Paul Merlin issued a Decision Approving Penalty and Order of Dismissal on March 15, 1989, approving the proposed civil penalty in this matter, stating that it had been paid by the operator, and dismissing the proceeding. The judge previously received a letter from the operator, filed in response to the judge's earlier show cause order, in which the operator asserts that it had paid the proposed civil penalty in issue. Counsel for the Secretary of Labor has filed with the Commission a Motion for Reconsideration, stating that the Secretary has been unable to locate any record indicating that the civil penalty has, in fact, been paid and requesting reopening of the proceeding. For the reasons discussed below, we deem the Secretary's motion to constitute a timely petition for discretionary review, which we grant. We vacate the dismissal order and remand to the judge for appropriate proceedings.

On May 3, 1988, an inspector of the Department Labor's Mine Safety and Health Administration issued to Camp Fork Fuel Company

("Camp Fork"), at its No. 4 Shelby Gap mine, a citation pursuant to section 104(a) of the Mine Act, 30 U.S.C. 814(a), alleging a violation of 30 C.F.R. § 75.206 for excessive width of mining entries. The citation was not contested by the operator. Subsequently, the Secretary notified Camp Fork of a proposed civil penalty of \$295 for the alleged violation, and the operator filed a "Blue Card" request for a hearing.

On August 22, 1988, the Secretary filed a Proposal for Assessment of Civil Penalty. Camp Fork did not file an answer to the proposal, as it was required to do in order to maintain its contest. See 29 C.F.R. § 2700.28. Accordingly, on December 22, 1988, Judge Merlin issued an Order to Respondent to Show Cause, explaining the requirements for filing an answer and directing the operator to file its answer or show good reason for not doing so within 30 days of the order. By handwritten letter dated January 23, 1989, from Camp Fork's bookkeeper, the operator stated that it disagreed with the citation but felt that it was cheaper to pay the proposed penalty than to litigate over it. Camp Fork asserted that it had paid the penalty by check #12087 on October 9, 1988. There is no indication in the record that a copy of this letter was served upon the Secretary as required, and no response to it from the Secretary appears in the record.

On March 15, 1989, Judge Merlin issued his dismissal order. He approved the \$295 proposed penalty assessment as being consistent with the Mine Act, noted that the operator had paid the proposed penalty, and dismissed the proceeding. On March 24, 1989, counsel for the Secretary filed with the Commission a Motion for Reconsideration, in which counsel states that the Secretary cannot locate any record reflecting payment of the civil penalty. The Secretary seeks reopening of the proceeding and requests that the judge issue an order directing payment of the penalty or submission of proof of payment.

Judge Merlin's jurisdiction in this matter terminated when his dismissal order issued on March 15, 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); 29 C.F.R. § 2700.70. Here, the Secretary's motion is a request for relief from the judge's decision and we will treat it as a timely petition for discretionary review. See, e.g., *Secretary on behalf of DeLisio v. Mathies Coal Co.*, 9 FMSHRC 193, 194 (February 1987).

An operator's payment of a civil penalty extinguishes its right to contest the penalty and the underlying alleged violation, except where payment has been made by genuine mistake. *Old Ben Coal Co.*, 7 FMSHRC 205, 207-10 (February 1985). Such payment would afford a proper basis for dismissal of this proceeding. The Secretary's motion, however, questions the basis upon which the judge's dismissal order rests.

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Accordingly, we grant the Secretary's petition for discretionary review, vacate the dismissal order, and remand this matter to the judge for further appropriate proceedings. 1/

Ford B. Ford, Chairman

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

1/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission in this matter.