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MSHA V. COAL JUNCTION COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
April 7, 1989

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

v. Docket No. PENN 88-260

COAL JUNCTION COAL COMPANY

BEFORE: Ford, Chairman; Doyle and Lastowka, Commissioners

DIRECTION FOR REVIEW AND 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) ("Mine Act"), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Dismissal on February 27, 1989, stating that the Commission has been informed by the Secretary of Labor that the proposed civil penalties had been paid by Coal Junction Coal Company ("Coal Junction"). However, in a letter to Judge Merlin dated March 3, 1989, and received by the Commission on March 6, 1989, Coal Junction submitted an Answer to the Secretary's Petition for Assessment of Civil Penalty, which had been filed in August 1988. The Answer indicates that Coal Junction wishes to pursue its contest in this matter. Under the circumstances presented, we deem Coal Junction's Answer to constitute, in effect, a petition for discretionary review, which we grant. The judge's dismissal order is vacated and this matter is remanded for further proceedings.

On April 25 and 26, 1988, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Coal Junction, at its surface coal mine in Pennsylvania, a number

of citations for alleged violations of mandatory standards. Coal Junction did not immediately contest the citations. In June 1988, MSHA notified Coal Junction that it proposed civil penalties of \$407 for the alleged violations. In response to this notification, Coal Junction filed with the Commission a "Blue Card" request for a hearing. On August 22, 1988,

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the Secretary filed with the Commission a Petition for Assessment of Civil Penalty, and certified that a copy of the petition had been mailed to Coal Junction.

Coal Junction did not file an answer to the Secretary's petition within 30 days, as it was required to do in order to maintain its contest. See 29 C.F.R. § 2700.28. Accordingly, on December 5, 1988, Judge Merlin issued to Coal Junction an Order to Show Cause explaining the requirements for filing an answer to a civil penalty proposal and ordering the operator to file its answer within 30 days or be found in default. No answer or other response to the show cause order was received by the Commission within that time.

On February 9, 1989, MSHA transmitted to the Commission's Docket Office a memorandum indicating, in relevant part, that the proposed civil penalties in this proceeding had been paid by the operator. On February 27, 1989, Judge Merlin issued his dismissal order, based on the information that the civil penalties had been paid. By letter dated March 3, 1989, the attorney for Coal Junction transmitted to the Commission an answer stating that Coal Junction wishes to contest the alleged violations. (The operator's papers do not refer to Judge Merlin's show cause or dismissal orders, do not mention the apparent payment of proposed civil penalties, and do not explain the late filing of the answer.)

The judge's jurisdiction in this matter terminated upon issuance of his dismissal order. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, relief from a judge's 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, we deem Coal Junction's answer to constitute, in effect, a timely petition for discretionary review of the judge's dismissal order. See, e.g., *Middle States Resources, Inc.*, 10 FMSHRC 1130 (September 1988).

An operator's payment of a civil penalty extinguishes its right to contest the penalty and the underlying violation, except where payment has been made by genuine mistake. *Old Ben Coal Co.*, 7 FMSHRC 205, 207-10 (February 1985). The filing of Coal Junction's answer, albeit late, suggests that, in the interest of justice, the operator should be heard with respect to MSHA's assertion that the penalties have been paid.

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Accordingly, we grant the operator'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.