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MSHA V. INDUSTRIAL CONSTRUCTORS
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
August 21, 1989

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

v. Docket No. WEST 89-86-M

INDUSTRIAL CONSTRUCTORS
CORPORATION

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

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). On June 13, 1989, Commission Chief Administrative Law Judge Paul Merlin issued an Order of Dismissal, stating that the Commission had been informed by the Secretary that the proposed penalty in this case had been paid. By letter dated July 24, 1989, addressed to counsel for the Secretary and copied to Judge Merlin, Industrial Constructors Corporation ("Industrial Constructors") states that its payment of a different civil penalty, for Citation No. 3065456, appears to have been mistakenly applied to Citation No. 2876658, the subject of the present proceeding. The operator requests that this matter be reopened. A copy of this letter was received by the Commission on July 27, 1989. We deem the operator's letter to constitute a request for relief from a final Commission order, incorporating a late-filed petition for discretionary review. For the reasons set forth below, we grant review, vacate the judge's dismissal order, and remand this matter for further proceedings.

The judge's jurisdiction in this matter terminated when his order of dismissal was issued. 29 C.F.R. 2700.65(c). Because the judge's decision has become final by the operation of law (30 U.S.C. 823(d)(1)), we can consider the merits of Industrial Constructors' request, received by the Commission after the judge's decision became final, only if we construe it as a request for relief from a final Commission decision incorporating a late-filed petition for discretionary review. See e.g., A.H. Smith Stone Company, 11 FMSHRC 796, 797-98 (May 1989), and authorities cited.

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Here, Industrial Constructors asserts in its letter that the reason that its request for relief from the judge's dismissal order was late was because it did not receive the judge's order or it was misplaced in the company's office. Under the circumstances, we excuse the late filing, and consider the letter as a petition for discretionary review. See generally, M.M Sundt Construction Co., 8 FMSHRC 1269, 1270-71 (September 1986). See also Ten-A-Coal Co., 10 FMSHRC 1132, 1133 (September 1988).

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). The operator's request for relief questions the basis upon which the judge's dismissal order rests. The operator's letter suggests that the operator should be heard with respect to the correctness of the Secretary's prior notification to the Commission that the proposed civil penalty for the citation in issue had been paid. See Coal Junction Coal Co., 11 FMSHRC 502, 503 (April 1989).

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

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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