

CCASE:
SOL (MSHA) V. TUG VALLEY COAL PROCESSING
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February 22, 1994

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner :
v. : Docket No. WEVA 94-26
TUG VALLEY COAL PROCESSING, :
Respondent :

BEFORE: Holen, Chairman; Backley and Doyle, Commissioners(Footnote 1)

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. (1988)(the "Mine Act"), Chief Administrative Law Judge Paul Merlin issued a Decision Approving Penalty and Order of Dismissal on January 13, 1994. Noting that Tug Valley Coal Processing ("Tug Valley") had paid the proposed penalty, the judge reviewed the appropriateness of the penalty in relation to the statutory criteria in section 110(i) of the Act, 30 U.S.C. 820(i), and dismissed the proceeding.

Tug Valley timely filed a petition for discretionary review of the judge's dismissal. Tug Valley asserts, inter alia, that, because it paid the penalty through "genuine mistake," it should not be precluded from maintaining a civil penalty proceeding. Pet. at 7. Tug Valley further contends that the judge committed a prejudicial error of procedure in dismissing the proceeding based upon the "ex parte representations of the Mine Safety and Health Administration ("MSHA")." Pet. at 1-2, 10.

"[T]he 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." Westmoreland Coal Co., 11 FMSHRC 275, 276 (March 1989), citing Old Ben Coal Co., 7 FMSHRC 205, 209 (February 1985). However, "where a civil penalty was paid by genuine mistake, the operator's right to contest the violation may not be lost." Id., citing Old Ben Coal Co., 7 FMSHRC at 210 n.6.

¹Pursuant to section 113(c) of the Mine Act, 30 U.S.C. 823(c), we have designated ourselves as a panel of three members to exercise "all of the powers of the Commission."

The record in this proceeding does not contain sufficient information for the Commission to determine whether Tug Valley's payment of the penalty was a "genuine mistake" as it contends in its petition. Further proceedings are necessary to address Tug Valley's assertion and to determine what relief, if any, is appropriate.

Accordingly, Tug Valley's petition is granted, the judge's decision is vacated, and the matter is remanded for further proceedings consistent with this order. (Footnote 2)

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

²Tug Valley has not offered any support for its allegation that the judge dismissed the case based on an ex parte communication from MSHA. Pet. at 8-10. It is evident from the record that he based his dismissal on Tug Valley's payment of the penalty assessment, which is a matter of public record. See Commission Procedural Rule 82, 58 Fed. Reg. 12158, 12173-74 (March 3, 1993), to be codified at 29 C.F.R. 2700.82.