

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 26, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 2001-37-M
	:	A.C. No. 39-00022-05543
DACOTAH CEMENT	:	

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Jordan, Chairman; Beatty, Commissioner

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On December 20, 2000, Chief Administrative Law Judge David Barbour issued an Order of Dismissal to Dacotah Cement (“Dacotah”) dismissing this civil penalty proceeding for payment of the proposed penalty. On January 9, 2001, the Commission received from Dacotah a request to vacate the judge’s dismissal order. The Secretary of Labor does not oppose the motion for relief filed by Dacotah.

In its request, Dacotah contends that on January 2, 2001, it received a phone call from Tom Giblin, counsel to Judge Barbour, notifying it that this proceeding was dismissed. Mot. at 1. Dacotah asserts that it told Mr. Giblin that it “decided to pay the penalties not to admit guilt,” but to prevent the accrual of interest on the penalties. *Id.* It states that it “evidently paid . . . in error” and requests a hearing. *Id.* Attached to its request is a copy of Judge Barbour’s order dismissing the proceedings, with a notation by John Harris, Dacotah’s safety director, of receipt on December 26, 2000.

The judge’s jurisdiction in this matter terminated when his decision was issued on December 20, 2000. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission’s procedural rules, relief from a judge’s decision may be sought by filing a petition for

discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Dacotah's motion to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Resources, Inc.*, 10 FMSHRC 1130 (Sept. 1988).

It appears from the official file that on November 16, 2000, the Commission received Dacotah's timely-filed request for a hearing to contest the proposed penalty assessment at issue in this civil penalty proceeding. On December 7, 2000, the Commission received from MSHA a confirmation of its receipt of Dacotah's payment in this matter. Consequently, on December 20, 2000, Judge Barbour issued an order of dismissal.

The record indicates that Dacotah contested the proposed assessment by timely returning the green card, but subsequently paid the assessment. In circumstances in which an operator intentionally paid a proposed penalty assessment, the Commission has denied the operator's request to vacate an order of dismissal so that it could continue its contest of the related citation. *Old Ben Coal Co.*, 7 FMSHRC 205, 210 (Feb. 1985). In *Old Ben*, the Commission 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. *Id.* at 209. However, the Commission noted that where a civil penalty was paid by genuine mistake, the operator's right to contest the violation may not be lost. *Id.* at 210 n.6. In *Tug Valley Coal Processing*, the Commission vacated an order of dismissal and remanded based on its conclusion that the statement by the operator that it mistakenly paid a penalty did not amount to sufficient information for the Commission to determine whether payment was a "genuine mistake." 16 FMSHRC 216, 217 (Feb. 1994); *see also Westmoreland Coal Co.*, 11 FMSHRC 275, 276 (Mar. 1989) (same).

It appears that while Dacotah may have made a deliberate decision to pay in an effort to prevent any accrual of interest on the proposed penalties, it may have intended to continue its challenge of the penalties and underlying violations. However, whether Dacotah intended to continue its challenge of the proposed penalties is not entirely clear from its request. Thus, the record does not contain sufficient information to permit us to determine whether Dacotah's penalty payment was a "genuine mistake." *Compare Old Ben*, 7 FMSHRC at 210 & n.6 (denying operator's motion to vacate dismissal, and rejecting operator's argument that contest of citation should continue where operator did not intend to challenge proposed penalties that it paid) *with Consolidation Coal Co.*, 22 FMSHRC 1182, 1183-84 (Oct. 2000) (granting motion to vacate dismissal where operator inadvertently paid proposed penalties that it intended to challenge).

Accordingly, in the interest of justice, we grant Dacotah's petition, vacate the judge's dismissal order, and remand this matter to the judge, who shall determine whether relief from the dismissal order is warranted. If the judge determines that relief is appropriate, the case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, concurring:

We would grant the operator's request for relief here, because the Secretary does not oppose and the operator has offered a sufficient explanation for its failure to timely respond. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Rule 60(b). *See Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Distribution

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