

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

October 13, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2000-94
ADMINISTRATION (MSHA)	:	A.C. No. 46-01318-04436
	:	
v.	:	
	:	
CONSOLIDATION COAL COMPANY	:	

BEFORE: Jordan, Chairman; Riley, and Verheggen, Commissioners<sup>1</sup>

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. (1994) (“Mine Act”). On September 5, 2000, Chief Administrative Law Judge David Barbour issued an Order of Dismissal to Consolidation Coal Company (“Consolidation”) dismissing this civil penalty proceeding for payment of the proposed penalty. On October 3, 2000, the Commission received from Consolidation a request to vacate the judge’s dismissal order. The Secretary of Labor does not oppose the motion for relief filed by Consolidation.

In its motion, Consolidation asserts that it timely submitted a request for a hearing (“green card”) to contest the proposed penalty associated with Order No. 7087724, but that it inadvertently paid the assessment along with six other penalties it intended to pay, which were issued by the Department of Labor’s Mine Safety and Health Administration at the same time.

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<sup>1</sup> Commissioner Beatty recused himself in this matter and took no part in its consideration. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

Mot. at 1. Consolidation contends that on August 9, 2000, the day after it had sent payment in the amount of \$3,900 for the proposed assessment, it called MSHA's Assessment Office to advise them that it had mistakenly paid the penalty and that it still intended to contest it. *Id.* Consolidation states that MSHA informed it that the payment would be held pending settlement or adjudication. *Id.* Consolidation contends that on September 11, 2000, it received the Secretary's Petition for Assessment of Penalty in this case, but was subsequently informed by counsel for the Secretary that on September 5, 2000, Judge Barbour had entered an order dismissing this case in light of payment. *Id.* at 2. Consolidation offers that the documents must have crossed in the mail, creating confusion. *Id.* Consolidation requests that the Commission reopen this proceeding. *Id.*

The judge's jurisdiction in this matter terminated when his decision was issued on September 5, 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 Consolidation'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 record that on August 4, 2000, the Commission received Consolidation's timely-filed request for a hearing to contest the proposed penalty assessment at issue in this civil penalty proceeding. On August 30, 2000, MSHA sent to the Commission via facsimile a confirmation of its receipt of Consolidation's payment in this matter. Consequently, on September 1, 2000, Chief Judge Barbour issued an order assigning this case to himself, and on September 5, issued an order of dismissal. After Chief Judge Barbour's dismissal order, the Secretary of Labor filed a Petition for Assessment of Penalty in this case on September 11, 2000.

The record indicates that Consolidation contested the proposed assessment associated with Order No. 7087724 by timely returning the green card, but subsequently inadvertently paid the assessment. The record evidence sufficiently supports Consolidation's allegations of inadvertent payment. In similar circumstances, the Commission previously has granted an operator's unopposed request for relief where the operator inadvertently paid a penalty assessment. *See Cyprus Emerald Resources Corp.*, 21 FMSHRC 592 (June 1999) (granting motion to reopen where operator supported its allegation that it mistakenly paid proposed penalty assessment with an affidavit); *see also Stillwater Mining Co.*, 19 FMSHRC 1021 (June 1997) (granting operator's motion to reopen where operator inadvertently paid assessment because Secretary failed to send assessment to its counsel of record).

For the foregoing reasons, we vacate the judge's dismissal order and remand this matter to the judge for further proceedings. *See REB Enterprises, Inc.*, 18 FMSHRC 311, 313 (Mar. 1996). The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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Mary Lu Jordan, Chairman

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

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