

CCASE:

MSHA V. SCOTIA COAL MINING

DDATE:

19800331

TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
WASHINGTON, DC

March 31, 1980

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

Docket Nos. BARB 78-306 through  
78-333  
BARB 78-609-P  
BARB 78-609-P(B)  
BARB 78-610-P

v.

SCOTIA COAL MINING COMPANY

DECISION

We granted interlocutory review to determine whether the administrative law judge abused his discretion when he denied the parties' motion for a stay of all proceedings until completion of a trial of criminal charges against Scotia Coal Mining Company in federal district court.

Scotia has sought Commission review of twenty-eight withdrawal orders, and the Secretary has sought the assessment of penalties for the alleged violations associated with the withdrawal orders. The violations are apparently alleged to have occurred in February and March of 1976. The withdrawal orders were issued under the Federal Coal Mine Health and Safety Act of 1969, 1/ in March of 1978 as a result of an investigation and inspection precipitated by two explosions at Scotia's Mine in Ovenfork, Kentucky, in March of 1976. In August of 1978, the Secretary of Labor initiated the penalty cases and they were consolidated with the withdrawal order cases the next month.

On September 8, 1978, the Secretary filed a motion with the administrative law judge to stay proceedings during the Justice Department's investigation of the mine accidents. The judge granted a stay until February 1, 1979. On January 31, 1979, the Secretary filed a motion to continue the stay because the U.S. Attorney had informed him that a grand jury would be convened to investigate the Scotia disaster. The stay was extended until June 1, 1979, and again until July 15, 1979. After the grand jury handed down an indictment, the judge granted another extension of the stay until October 15, 1979. The judge found that only five of the twenty-eight administrative cases are directly related to the allegations in the indictment, but was "reluctantly persuaded" that the stay of all proceedings should be continued. He noted the criminal trial was expected to begin between September 15 and October 15, 1979.

---

1/ 30 U.S.C. •801 et seq. (1976)(amended 1977)["the 1969 Act"].  
~634

On October 10, 1979, the Secretary again moved for an extension of the stay. Scotia joined this motion on October 24, 1979. On October 25, 1979, the judge issued an order staying eight of the cases, but returning twenty to the active trial docket. The judge first determined that only eight administrative cases are "factually related" to the criminal charges. He noted that the grand jury had completed its work and the administrative proceedings could not be used to assist the grand jury. He found that problems centering on the right to avoid self-incrimination under the Fifth Amendment will not arise in the criminal case since no natural persons had been indicted. The judge also stated that procedural devices such as particularized requests for a stay of discovery are available to the parties to protect their interests and ensure fairness of both the administrative and criminal proceedings. Finally, the administrative law judge noted that pretrial publicity, if it occurred, would not necessarily be prejudicial to the criminal defendants.

The parties then filed petitions for interlocutory review of the judge's ruling. We granted the petitions on November 30, 1979, and suspended all proceedings. 2/

The parties have presented several arguments that the judge abused his discretion. Both express concern that problems in the criminal proceedings could arise from pre-trial publicity. The parties fear that publicity stemming from the administrative cases may, if they are heard first, jeopardize Scotia's right to a fair criminal trial. The parties have overlooked that the federal district courts have the tools to mitigate any prejudicial effects of any publicity. See *DeVita v. Sills*, 422 F.2d 1172 (3rd Cir. 1970). In addition, the administrative law judge can take preventive measures short of a complete stay.

Both parties argue that the judge should have stayed the cases because differences in criminal discovery rules and Commission discovery rules will cause confusion, and possibly improper access to information by the prosecutor and defendants in the criminal case.

The administrative law judge stated in his order:

It is not apparent from the face of the charges or the parties' pleadings that the other 20 violations [those not stayed] present such an identity of issues and evidence with the criminal charges that any discovery problems may not, upon seasonable application by either party, be dealt with by the issuance of appropriate protective orders.

---

2/ The judge thereafter filed a "Supplement and Errata" to his order. We grant Scotia's motion to strike the supplemental material. We did not consider that material during our interlocutory review.

~635

It is clear from the judge's order that he carefully considered the points presented by the parties. Neither party at this time has offered any evidence of actual harm to the criminal proceedings and the judge stands ready to meet those problems if they do become concrete.

Further, the parties have failed to consider the public interest in the expeditious resolution of penalty cases. This oversight on the Secretary's part is especially unfortunate, 3/ and prevents us from according his views the deference to which they might otherwise be entitled. 4/ Congress has forcefully expressed its desire for the expeditious adjudication of penalty cases, and its dissatisfaction with the length of time between the occurrence of violations and the payment of penalties under the 1969 Act. 5/ As the judge recognized, there is a substantial public interest in the expeditious determination of whether penalties are warranted.

Finally, we reject the parties' contentions that the administrative law judge acted arbitrarily and capriciously in refusing to continue to stay all proceedings in the absence of circumstances substantially different from when he issued his stay of all cases until October 15, 1979. The administrative law judge's order indicates he carefully reviewed the facts before him at the time of the motion and concluded that returning twenty cases to the active trial docket was appropriate and would not interfere with the criminal proceedings. 6/

---

3/ The Secretary in his brief states, "The Secretary, prosecutor of the administrative cases, desires that the twenty-eight alleged violation [sic] and civil penalty cases be stayed. Balanced with this is Scotia's like desire to stay those cases. There are no counter-vailing factors balanced on the other side." (Emphasis added.) Br. at 12.

4/ Old Ben Coal Company, 1 FMSHRC 1480, 1484-1485, 1 BNA MSHC 2177, 2179-2180, 1979 CCH OSHD •23,969 (1979); and Helen Mining Company, 1 FMSHRC 1796, 1798-1801, 1 BNA MSHC 2193, 2194-2196, 1979 CCH OSHD □24,045 (1979)

5/ See S. Rep. No. 95-181, 95th Cong., 1st Sess. at 15-16 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 603-604 (1978). The Senate Committee that drafted the bill from which the Federal Mine Safety

and Health Act of 1977 was largely derived stated that "to effectively induce compliance, the penalty must be paid by the operator in reasonably close time proximity to the occurrence of the underlying violation." S. Rep. at 16, 1977 Legis. Hist. at 604.

6/ The Secretary raised an argument in his brief that was not raised in his petition for interlocutory review or before the judge. He claims that harm may come to the administrative penalty cases if all are not heard together. Br. at 19-26. Since he did not present this argument to the administrative law judge, we do not pass upon it. See *Ora Mae Coal Co.*, 1 FMSHRC 1963, 1 BNA MSHC 2258, 1979 CCH OSHD ¶24,126 (1979). We also intimate no view whatsoever on the matter discussed in footnote 10 of the Secretary's brief.

~636

The administrative law judge carefully weighed the parties interests and the public interest. We cannot say that he abused his discretion and we therefore leave his order undisturbed. Accordingly, the case is remanded to the administrative law judge. Our order of November 30, 1979, suspending the proceedings, is vacated.

Richard V. Backley, Commissioner

~637

Distribution

Robert I. Cusick, Esq.  
Tarrant, Combs, & Bullitt  
2600 Citizens Plaza  
Louisville, KY 40202  
Thomas A. Mascolino, Esq.  
Page H. Jackson, Esq.  
Ronald E. Meisburg, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd.  
Arlington, VA 22203  
President of Scotia Employees Assoc.  
P.O. Box 447  
Cumberland, KY 40823  
Foster D. Arnett, Esq.  
Arnett, Draper & Hagood  
United America Bank Bldg.  
Suite 1212  
Knoxville, TN 37902  
Richard C. Ward, Esq.  
Craft, Barrett, Hayes & Ward  
P.O. Drawer 1017  
Hazard, KY 41701

Administrative Law Judge Joseph B. Kennedy  
FMSHRC  
5203 Leesburg Pike, 10th Floor  
Falls Church, VA 22041