

CCASE:
ARNOLD SHARP V. BIG ELK COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 2, 1990

ARNOLD SHARP

v. Docket No. KENT 89-147-D

BIG ELK COAL COMPANY

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

DECISION

BY THE COMMISSION:

In this section 105(c)(3) discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801 et seq. (1982), the Commission granted Arnold Sharp's petition seeking interlocutory review of an order of Administrative Law Judge Gary Melick issued February 16, 1990.

The subject order was issued in response to a letter, dated February 5, 1990, from Sharp to the judge. Sharp, who is appearing pro se, had requested the judge remove himself from the case because he had issued orders staying the proceedings over Sharp's objections. In the letter, Sharp expressed concern for a fair hearing and sought dissolution of the existing stay order, renewing his demand for a prompt hearing.

In his order denying Sharp's request that the stay be dissolved the judge stated:

... This case has indeed twice been stayed pending final disposition of criminal perjury charges against an alleged essential witness in this proceeding, Jim Meese. The Complainant himself has indeed

maintained and pursued those charged. The outcome of such perjury charged could have a critical impact on the instant case, and, of course, if such charges could indeed very well benefit the Complainant's position in this case.

February 16, 1990 Order at 2.

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Thereafter Sharp filed the petition for interlocutory review which was granted.

The record developed to date indicates that, subsequent to his February 28, 1989 discharge, Sharp appeared and testified before a Commonwealth of Kentucky Department of Employment Services referee in an effort to secure unemployment compensation. Respondent's Administrative Director, Jim Meese, also testified at this hearing. Because Sharp believed Meese's testimony at that hearing to be false, he caused a criminal complaint and arrest warrant to be issued against Meese. Accordingly, on September 13, 1989, Respondent moved for a postponement of the instant action, asserting that Meese, the principal and likely only witness for respondent in the Mine Act discrimination proceeding pending before the administrative law judge, intended to assert his Fifth Amendment privilege against self-recrimination "prevent[ing] him from testifying further as to the matters surrounding the criminal case and any collateral civil matter." Motion for Postponement at 2.

Sharp filed his opposition to the motion for postponement arguing that the criminal matter has no bearing upon the discrimination matter. Sharp requested that the then scheduled hearing before the administrative law judge go forward.

The respondent filed a reply asserting:

... The subject matter of the unemployment hearing factually mirrors the instant proceeding. Should Mr. Meese testify in the hearing scheduled in this discrimination proceeding before the Federal Mine Safety and Health Review Commission relative to the facts surrounding Complainant's discharge, he would waive his Fifth Amendment privilege against self-recrimination. In Re: Atterbury, 316 F.2d 106, 109 (6th Cir. 1963); Anderson v. Commonwealth, Ky. App., 554 S.W. 2d 882, 884 (1977).

On September 20, 1989, the judge issued an Order of Continuance and Stay Order:

I find upon consideration of the circumstances that the Motion for Continuance is well-founded and that it would be in the best interests of this litigation to grant a brief continuance and stay in these proceedings pending disposition of the noted criminal

proceedings. This is particularly true in this case since the criminal charges involve a claim that a witness apparently essential to this case gave a false statement in a related proceeding and that criminal case is already scheduled for trial in the near future.

Order at 3.

Thereafter, on January 5, 1990, the criminal charge against Meese

was dismissed. However, on January 22, 1990, the dismissal was appealed and the criminal action remains pending. Noting these occurrences and over the objections of Sharp, the administrative law judge issued a second stay order on February 2, 1990, pending "... final disposition of the noted criminal proceedings." Order at 1.

In determining whether a Fifth Amendment privilege is validly invoked, the judge has wide but not unlimited discretion. In exercising that discretion, however, the judge must be informed. *United States v. Metz*, 608 F.2d 147, 156 (5th Cir. (1979)), cert denied, 449 U.S. 821, 101 S.Ct. 80, 66 L.Ed. 2d 24 (1980); *United States v. Van Deveer*, 577 F.2d 1016, 1017 (5th Cir. 1978); *United States v. Hart*, 729 F.2d 662, 670 (10th Cir. 1984); cert denied, 469 U.S. 1161, 105 S. Ct. 914, 83 L.Ed. 2d 927. The mere assertion of the Fifth Amendment privilege, without more does not exonerate a witness from testifying. The judge must make an informed determination of the validity of the claim. *United States v. Sheikh*, 654 F.2 1057 (5th Cir. 1981), cert denied, 455 U.S. 991, 102 S.Ct. 1617, 71 L.Ed. 2d 852.

We have thoroughly reviewed the present record and find an inadequate basis for the existing stay. The record contains only a vague indication of the exact nature of the criminal charges pending against respondent's witness Meese. More importantly, there is no clear indication as to how those charges impact upon the issues presented by Sharp's complaint of unlawful discharge in violation of section 105(c) of the Mine Act. As such, the record contains an inadequate foundation for the present acceptance of respondent's bald claim that Meese's testimony in the instant case necessarily would result in a waiver of his Fifth Amendment privilege. Further demonstration by respondent and further inquiry by the judge are required, especially in light of Sharp's right under the Mine Act to an expeditious hearing on his discrimination complaint.

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Accordingly, we vacate the existing stay and remand to the judge for further proceedings consistent with this order.

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