

CCASE:
EMERY MINING V. SOL (MSHA) AND UMWA
DDATE:
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

EMERY MINING CORPORATION
AND/OR UTAH POWER & LIGHT
COMPANY,

CONTESTANTS

v.

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

AND

UNITED MINE WORKERS OF
AMERICA, (UMWA),
INTERVENOR

CONTEST PROCEEDINGS

Docket No. WEST 87-130-R
Citation No. 2844485; 3/24/87

Docket No. WEST 87-131-R
Order No. 2844486; 3/24/87

Docket No. WEST 87-132-R
Order No. 2844488; 3/24/87

Docket No. WEST 87-133-R
Order No. 2844489; 3/24/87

Docket No. WEST 87-144-R
Order No. 2844795; 3/24/87

Docket No. WEST 87-145-R
Order No. 2844796; 3/24/87

Docket No. WEST 87-146-R
Order No. 2844798; 3/24/87

Docket No. WEST 87-147-R
Order No. 2844800; 3/24/87

Docket No. WEST 87-150-R
Order No. 2844805; 3/24/87

Docket No. WEST 87-152-R
Order No. 2844807; 3/24/87

Docket No. WEST 87-153-R
Order No. 2844808; 3/24/87

Docket No. WEST 87-156-R
Order No. 2844813; 3/24/87

Docket No. WEST 87-157-R
Order No. 2844815; 3/24/87

Docket No. WEST 87-160-R
Order No. 2844822; 3/24/87

Docket No. WEST 87-161-R
Order No. 2844823; 3/24/87

Docket No. WEST 87-248-R
Citation No. 2844835; 8/13/87

Wilberg Mine

Mine I.D. No. 42-00080

~354

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

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 87-208
A.C. No. 42-00080-03578

v.

Docket No. WEST 87-209
A.C. No. 42-00080-03579

EMERY MINING CORPORATION, AND
ITS SUCCESSOR-IN-INTEREST
UTAH POWER & LIGHT COMPANY,
MINING DIV.,
RESPONDENT

Docket No. WEST 88-25
A.C. No. 42-00080-03584

Wilberg Mine

AND

Consolidated

UNITED MINE WORKERS OF
AMERICA (UMWA),
INTERVENOR

ORDER

The issue presented here is whether the hearing in the above cases, now scheduled to commence on March 13, 1990, in Price, Utah should be rescheduled until after May 31, 1990.

Emery Mining Corporation (Emery) has filed a motion seeking the continuance. Secretary opposes and Intervenor did not state a position.

In support of its motion Emery states as follows:

That after the Wilberg Mine fire wrongful death claims were made against Utah Power & Light Company (UP&L). Some of UP&L's insurance carriers refused to contribute and UP&L sought reimbursement from certain carriers. After the fire UP&L also brought a product liability action against manufacturers of equipment involved in the fire. The equipment manufacturers impleaded Emery as a third party defendant.

The case involving UP&L, UP&L's property insurance carriers, the equipment manufacturers and Emery, the "products case", is scheduled to begin trial on April 23, 1990, in the Fourth Judicial District Court of Utah County in Provo.

With the addition of accrued interest, the total amount at issue in the products case exceeds \$100,000,000.

The cases pending before the Presiding Judge involve allegations resulting from MSHA's investigation of the Wilberg fire. Since the focus of the products case will be directed at the events of the fire, it is likely the media will attend the trial and fully report the proceedings. In short, the penalty cases if tried in March will be a "warm-up" for publicity on the products case.

~355

The expected media coverage of the Commission cases may prejudice the parties in the products case (where hearsay is inadmissible) and it could be difficult to impanel an impartial jury in the products case.

Further, media representatives are expected to seek interviews with counsel, government and company officials. In addition, television and still photography may be requested in the courtroom during the trial.

The trial of the MSHA cases after the completion of the products case remove the problems connected with pre-trial publicity and should ameliorate possible media disruption and will remove any barrier to rapid efficient disposition of the pending cases or to their settlement.

The Secretary opposes Emery's motion.

The Secretary states as follows: she believes it was appropriate to stay the hearing during the period of the criminal referral. However, the Secretary urges it is time to resolve this matter without further delay.

The Secretary believes it is unfair to the families of the victims, as well as those in management, labor and government who participated in the investigation and recovery effort and to the general public to continue the hearing.

Potential harm in a third party law suit should not be a factor in determining a continuance here. It is urged that ample procedural and evidentiary rules exist in state courts and state tort laws to protect the interest of the parties in that case.

The Secretary further urges that prompt resolution of the pending Commission cases will serve as a deterrent to former employees of Emery, now working for UP&L, other nearby mines and to the general mining community. It is contended this will encourage safe mining operations -- the underlying purpose of the Act.

Since Commission proceedings are public hearings the potential presence of the press should not be a basis for a continuance.

Finally, these proceedings before the Commission were filed long before the third party suit involving Emery.

In short, the Secretary urges that judicial efficiency supports going forward rather than adding to further delay and fading memories.

Discussion

Whether a continuance should be granted or denied is within the discretion of the Presiding Judge. Commission Rule 54, 29 C.F.R. 2700.54.

We have reached the point where the Commission cases and the State of Utah products case are essentially scheduled to be heard back to back. This no doubt occurred because all parties involved were sensitive to the constitutional issues presented by parallel civil and criminal prosecutions. Further, the United States Attorney for the State of Utah requested that the civil administrative cases be stayed until the Secretary of Labor's criminal referral was resolved.

On August 25, 1989, the United States Attorney declined to initiate prosecutions against Emery, or any of its agents, for violations of the Mine Act arising from the fire. Further, in December, 1989, the related statute of limitations expired and the statute bars any criminal prosecutions.

These proceedings were originally brought against Emery to collect civil penalties for conditions that MSHA inspectors believed existed at the Wilberg Mine fire. At one time 44 cases were pending before the Presiding Judge. Some of the cases have been settled and others are on appeal. Only 19 cases remain pending before the Presiding Judge.

While the Act makes civil penalties mandatory for proven violations of mandatory safety standards, penalties are for the purpose of deterrence, not punishment. *National Independent Coal Operators' Ass'n. v. Kleppe*, 423 U.S. 388 (1976).

Normally a public interest exists in prompt penalty deterrence if it were proved that Emery violated a standard. But that interest is considerably reduced in this situation.

Due to no fault of the parties five years have expired. Emery has no employees but it continues to be a corporation in good standing and with assets to pay any civil penalty imposed in these proceedings (documented by papers filed in these cases with respect to successorship issues). Since prompt deterrence is no longer a predominant factor here, I conclude the public interest is best served by the fair and orderly adjudication of these cases.

The parties have not been dilatory in these proceedings before the Commission. The sheer volume of the files and the reduction in the number of cases from 44 to 19 cases attest to this fact.

~357

The Judge believes Emery and the Secretary may well be able to settle many of the violations at issue in the pending cases after completion of the products case leaving only a few, if any, for trial.

Such a result would serve judicial economy. The three-month continuance sought here requires only a small investment of time for a potentially large savings in Commission resources.

For the foregoing reasons the following order is appropriate:

ORDER

1. Emery's motion for a continuance of the scheduled hearing is granted.
2. The hearing scheduled to commence on March 13, 1990, is cancelled.
3. The hearing will now commence at the following time and place:

9:00 a.m., Tuesday, June 5, 1990
The hearing will continue on the following dates:

June 5, 1990 through June 8, 1990
June 11, 1990 through June 16, 1990
June 18, 1990 through June 23, 1990
Carbon County Court Complex
(Check with District Court Clerk
for directions to courtroom)
149 East 100 South
Price, Utah

Any person intending to attend this hearing who requires special accessibility features and/or any auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Thus, the Commission may, subject to the limitations of 29 C.F.R. 2706 150(a)(3) and 160(e), ensure access for any handicapped person who gives reasonable advance notice.

John J. Morris
Administrative Law Judge