

CCASE:
CLARENCE BALL (MSHA) V. B & B MINING,
LAUREL MOUNTAIN MINING,
ROBERT ESSEKS, JODA BLANKENSHIP
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006
June 13, 1983

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

on behalf of Clarence Ball Docket No. VA 80-128-D

v.

B&B MINING COMPANY, INC.,
LAUREL MOUNTAIN MINING COMPANY,
ROBERT ESSEKS, JODA BLANKENSHIP

ORDER

This case is before the Commission upon grant of a petition for discretionary review filed by the Secretary of Labor. 30 U.S.C. 823(d)(2)(A). The issues upon which review was granted concern the appropriate procedures for assessing penalties in discrimination cases brought pursuant to 30 U.S.C. 815(c), and the appropriate rate of interest to be applied to backpay awards in such proceedings.

Subsequent to our granting of the petition for discretionary review, the Secretary filed a motion to "withdraw his appeal" and for "dismissal of the proceeding." The Secretary asserts that a penalty has since been separately assessed and paid, and that the amount of backpay and interest payable to the miner has been resolved by an agreement reached in bankruptcy proceedings involving the operator. Therefore, the Secretary submits that the controversies before the Commission in this case are moot. No opposition to the Secretary's motion was filed.

We find it unnecessary to reach the questions of whether the issues in the proceeding before the Commission are moot or, if so, whether dismissal would be required. See *Climax Molybdenum Co. v. Secretary of Labor & FMSHRC*, No. 80-2187, 10th Cir (March 21, 1983), slip op. at 7-10. Nor do we need to reach the Secretary's argument, in response to our order to show cause, concerning the Commission's jurisdiction over settlements in discrimination proceedings. The questions of law and policy upon which discretionary review was granted in this case are also pending before the Commission in other cases. See e.g., *Arkansas-Carbona Co.*, Docket No. CENT 81-13-D; *Ottawa Silica Co.*, LAKE 81-163-DM. In light of this fact and based

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on our review of the entire record in the present case, we find that the case before us no longer presents a "substantial question of law, policy or discretion." 30 U.S.C. 823(d)(2)(A)(ii)(IV). Accordingly, our direction for review in this case is hereby vacated and the administrative law judge's decision stands as the final order of the Commission. See 30 U.S.C. 823(d)(1).

We wish to point out, however, that the procedure followed in the present case exposes the parties as well as the effectiveness of their compromise agreement to unnecessary risks. Where a matter is in litigation before any tribunal, it is eminently sensible, if not legally mandated, to seek an order from that tribunal before a "binding" agreement between the parties that purportedly disposes of that litigation is effectuated. See also *Matter of Gary Aircraft Corp.*, 698 F.2d 775 (5th Cir. 1983), and cases cited therein.

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