

CCASE:
JAMES CLARKE (MSHA) V. T.P. MINING
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TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C. 20006
JUNE 14, 1984

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

on behalf of JAMES M. CLARKE

v.

Docket No. L 83-97-D

T. P. MINING, INC.

ORDER

Administrative Law Judge Joseph B. Kennedy's letter of May 31, 1984, "responding" to the Secretary of Labor's petition for discretionary review in this matter is an improper circumvention of the Commission's Rules of Procedure. Accord, *Belcher Mine, Inc.*, Docket No. SE 84-4-M (Order, June 1, 1984). Therefore, it will not be placed in the official record in this case nor will it be considered by the Commission in ruling on the issues presented by the Secretary's petition for discretionary review.

Unlike the action we took in *Belcher*, however, we do not at this time return the letter to the judge. Rather, because the letter, on its face, indicates that the judge engaged in a prohibited ex parte telephone conversation with counsel for the operator, 1/ we will retain the letter in a separate file pending appropriate inquiry pursuant to Commission Rule 82. See also *Inverness Mining Co.*, 5 FMSHRC 1384, 1388 n. 3 (August 1983); *Knox County Stone Co.*, 3 FMSHRC 2478 (November 1981).

1/ At page 3 of his letter the judge states:

It is worth noting that at no time did counsel for the operator join the Solicitor in asserting that an "important ingredient" of

the money settlement to Mr. Clarke was "the Secretary's determination to forsake the civil penalty." This was because the basis for the settlement was fully disclosed in a discussion between counsel for the operator and the trial judge to which [counsel for the Secretary] was not a party. [Emphasis added].

~1402

Accordingly, the administrative law judge and counsel for the operator are hereby ordered to submit sworn statements providing full disclosure of the details and substance of their telephone conversation of March 28, 1984. It is further ordered that these statements be received by the Commission. and served on counsel for the Secretary, no later than Friday, June 22, 1984.

~1403

Distribution

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