

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

AUG 01 2017

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINSTRATION (MSHA)	:	Docket No. PENN 2017-109
	:	
	:	
	:	
v.	:	
	:	
	:	
LARRY ANDERSON, formerly employed	:	
by AK COAL RESOURCES INC.	:	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012). It involves a section 110(c) proceeding¹ in which Larry Anderson served notices of deposition on an attorney in the Secretary of Labor’s Office of the Solicitor and on an unnamed official of the Mine Safety and Health Administration. The Secretary in turn filed two motions for protective orders. In an order dated July 20, 2017, the Administrative Law Judge granted in part and denied in part the Secretary’s motions. The Judge’s order addressed the Secretary’s contentions regarding the qualified immunity privilege, deliberative process privilege, investigative process privilege, attorney-client privilege, and attorney work product privilege.

On July 26, 2017, the Secretary filed a motion to certify for interlocutory review the Judge’s order and to suspend the depositions and trial proceedings. On that same day the Judge denied the motion.

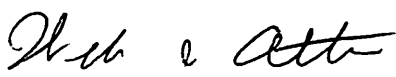
¹ Section 110(c) of the Mine Act states: “Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).” 30 U.S.C. § 820(c).

On July 27, 2017, the Secretary filed a Petition for Interlocutory Review and For Suspension of Two Depositions and Trial Proceedings Below, pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76. This petition seeks review of the Judge's July 20, 2017, order. The petition seeks review on the grounds that the information sought in the two depositions is not relevant as a matter of law.

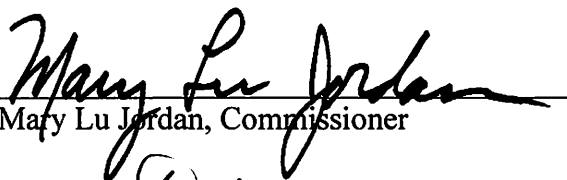
Commission Procedural Rule 76(a) provides that interlocutory review is a matter of sound discretion of the Commission, and that the Commission may grant interlocutory review upon a determination that the Judge's interlocutory ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a).

The Commission usually does not grant interlocutory review of discovery orders. *See Nagel v. Newmont USA Ltd.*, 32 FMSHRC 1694, 1696 (Nov. 2010) (denying petition for interlocutory review of a motion to compel production); *Asarco, Inc.*, 14 FMSHRC 1323, 1328 (Aug. 1992) (“[U]nless there is a ‘manifest abuse of discretion’ on the part of a judge, discovery orders are not ordinarily subject to interlocutory appellate review.”) (citations omitted); *In re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 1004 (June 1992) (“[D]iscovery orders are usually not appealable.”); *see also* 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2006 (3d ed. 2002) (same).

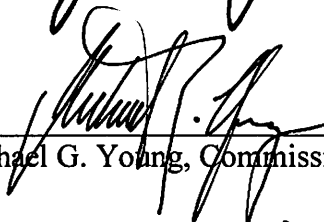
Moreover, the Secretary stated in his petition that the Judge ordered one of the depositions to go forward on July 27, and that the Secretary “preserved his objections as to relevance” regarding certain questions. Petition at 1, n.1 Given that this deposition has already taken place, and objections have been preserved, Letter from Amelia B. Bryson, Attorney, U.S. Dept. of Labor (July 28, 2017), immediate review would not materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a)(2).² A similar process can be put in place for the second deposition (scheduled for August 2, 2017), whereby the Secretary could preserve his objections.³ We therefore deny the petition, as well as the Secretary’s request to suspend the two depositions and any trial proceedings before the Judge pending appeal.



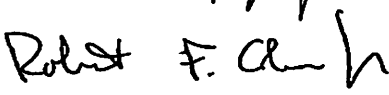
William I. Althen, Acting Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

² Because the deposition of Stepanic has already occurred, the Secretary’s interlocutory appeal of the Judge’s order and his request to suspend that deposition may also be moot.

³ We note that the Secretary does not make a showing that this process will cause great harm.

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