FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 2, 2015

POCAHONTAS COAL COMPANY, LLC, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent.	CONTEST PROCEEDING Docket No. WEVA 2014-395-R Order No. 3576153; 12/19/2013 Mine: Affinity Mine Mine ID: 46-08878
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. POCAHONTAS COAL COMPANY, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2014-1028 A.C. No. 46-08878-350475 Mine: Affinity Mine

ORDER DENYING THE SECRETARY'S MOTION FOR CERTIFICATION FOR INTERLOCUTORY REVIEW & ORDER DENYING MOTION TO STAY

Before: Judge Miller

These cases are before me upon a notice of contest filed by Pocahontas Coal Company and a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. On June 23, 2015 the Secretary filed a Motion for Certification for Interlocutory Review of the court's June 18, 2015 Order Denying the Secretary's Motion to Reconsider. For reasons that follow, the Secretary's Motion for Certification for Interlocutory Review is **DENIED**. The Secretary also filed a Motion to Stay the court's June 18, 2015 Order Denying the Secretary's Motion to Reconsider. The Motion to Stay is **DENIED**.

On April 13, 2015 the Secretary filed a Motion for Protective Order in which he asked the court to prevent the depositions of attorneys from the Office of the Solicitor who had been subpoenaed by Respondent. On May 22, 2015 the court issued an Order Granting in Part and Denying in Part the Secretary's Motion for Protective Order and found that factual information considered by MSHA and the attorneys when selecting and grouping the 42 enforcement actions included in the NPOV, as well as facts involving who, what, where and when the selections were made, may be relevant, were discoverable, and were not privileged. The Secretary was given the opportunity to advise Pocahontas whether a person from MSHA was involved in the

selection of the 42 enforcement documents included in the NPOV, which would obviate the need for an attorney to supply the facts surrounding the selection. The Secretary indicated that it would serve no purpose to depose an employee of MSHA, as there was no one who could provide the information sought by the mine. Even so, the Secretary was ordered to provide a person with knowledge from MSHA to be deposed, and, following the deposition, to respond in writing to interrogatories regarding the selection of the citations that were listed on the NPOV that was issued to the mine. The order addressed all of the privileges raised by the Secretary and allowed Respondent a deposition and interrogatories regarding only the facts surrounding the selection of the citations. On June 5, 2015 the Secretary filed a Motion to Reconsider the court's May 22, 2015 order, and attached an affidavit from an MSHA employee who was involved, in some respect, with the selection of the 42 enforcement documents. On June 18, 2015 the court denied the Secretary's Motion to Reconsider and set new discovery timelines. Subsequently, on June 23, 2015 the Secretary filed this Motion for Certification for Interlocutory Review.

The Secretary argues that the court should certify for interlocutory review its June 18, 2015 order because that ruling involves controlling questions of law and immediate review may materially advance the final disposition of these proceedings. Specifically, the Secretary argues that three controlling questions of law were raised by the June 18, 2015 order:

> (1) whether the facts that the ALJ found to be discoverable are inextricably intertwined with privileged information covered by the attorney-client, attorney work product, and deliberative-process privileges;
> (2) whether the Secretary's issuance of a POV notice is subject to review for "abuse of discretion;" and, if so,
> (3) whether the facts that the ALJ found to be discoverable are relevant to whether the Secretary abused that discretion.

Sec'y Mot. for Certification for Interlocutory Rev. 3-4. The Secretary asserts that immediate review of these questions may save that amount of time that it would take the parties to complete the deposition and interrogatories which the court ordered. While the Secretary concedes that pre-trial discovery rulings are not normally subject to interlocutory review, he argues that Commission precedent demonstrates that interlocutory review may be appropriate when there is a "'manifest abuse of discretion' on the part of the judge" or where "'unprecedented litigation of enormous impact and concern to all parties . . . raises complex procedural and substantive issues of first impression.'" *Id.* 2, 4 (quoting *Asarco, Inc.*, 14 FMSHRC 1323, 1328 (1992) and *In re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 1004 (1992)). Further, the Secretary asserts that how the Commission applies the pattern of violations rule, and what discovery is allowed in these types of proceedings, will have an enormous impact on how the Secretary enforces the Act. Finally, the Secretary argues that his prosecutorial discretion is, at most, reviewable only under the "abuse of discretion" standard, and the issues concerning discovery of the bases for the exercise of his discretion are important enough to warrant interlocutory review.

During a status conference on June 25, 2015 the Secretary asked for an immediate ruling on his motion for interlocutory review and Pocahontas indicated that it intended to file a

response within the time allowed by Commission rules. Pocahontas was informed that it may file a response for the record, but that a decision may be issued before the time has elapsed for the filing of a response. Also, at the conference on June 25, 2015, the parties agreed to a date of July 2, 2015 for the deposition of Mr. VanDyke, the MSHA employee whose declaration was attached to the motion for reconsideration and who was involved in the selection of the 42 citations and orders listed in the NPOV. Further, the court set a deadline of July 10, 2015 for Respondent to submit written interrogatories to discover the facts surrounding the selection of the documents listed on the NPOV, and a deadline of July 17, 2015 for the Secretary to respond in writing to those interrogatories. The parties will have until August 17, 2015 to supplement the record so that the court can address the motions for summary decision filed by each party.

The Commission's Procedural Rules state that "[i]nterlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission." 29 C.F.R. § 2700.76(a). Interlocutory review "cannot be granted unless . . . [t]he Judge has certified, upon . . . the motion of a party, that [her] interlocutory ruling involves a controlling question of law and that in [her] opinion immediate review will materially advance the final disposition of the proceeding." *Id.* at § 2700.76(a)(1)(i).

I find that interlocutory review of the June 18, 2015 order is not merited on the facts of this case. As the Secretary correctly points out, pre-trial discovery rulings are usually not the subject of interlocutory review. While the Secretary argues that the Commission, in *In re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987 (1992) ("Dust Cases"), recognized a narrow exception to this usual practice, I find that the Secretary's reliance on the case is misplaced. In *Dust Cases* the Commission, in a footnote, stated that its decision to grant the petitions for interlocutory review of the discovery related orders was "grounded in the recognition that . . . [the case was] an unprecedented litigation of enormous impact and concern to all parties that raise[d] complex procedural and substantive issues of first impression." *Id.* at 1004 n. 19. *Dust Cases* involved a dispute between the Secretary and approximately 500 operators who were alleged to have altered respirable dust samples. There, roughly 4,700 citations were at issue, and both the Secretary and the mine operators sought interlocutory review of three discovery related orders addressing hundreds of documents sought by the operators from the Secretary. Unlike *Dust Cases*, the Secretary here seeks interlocutory review of matters that involve far less material being sought through discovery, only one mine operator is involved, and, in the court's opinion, the case does not rise to the same level of complexity that was present in *Dust Cases*. Accordingly, I find that this matter does not meet the exception outlined in *Dust Cases*.

While the Secretary argues that the standard of review in this matter affects the scope of discovery, and that issues concerning discovery of the bases for the exercise of his prosecutorial discretion are important enough to warrant interlocutory review, I disagree. No matter the standard of review, the scope of discovery in Commission proceedings remains the same. Here, as the court has previously explained, the scope of discovery includes facts which go to the issue of whether the Secretary acted in an arbitrary and capricious manner. Both the original May 22, 2015 order and subsequent June 18, 2015 order made clear that only facts related to who selected and grouped the citations and orders included in the NPOV, what information they considered, when they considered it, where they considered it, and what facts they presented to the

Administrator so that he could make the final determination, were discoverable. The Secretary's internal deliberations involving opinions, thoughts, conclusions and legal theories leading up to the decision to issue the NPOV are privileged, and will remain privileged based on the information before the court. Accordingly, the Secretary's privileges remain intact through the many orders issued in this case restricting discovery and limiting it to only facts. Those orders remain in effect while the final deposition and interrogatories are completed by the parties.

The factual information sought by Pocahontas is limited, and any time preparing for and participating in the deposition and interrogatories will be minimal compared to the time it will take the Commission to address these issues. This case has been ongoing for nearly two years, and the parties have inched along through discovery and are now at a point where the motions for summary decision can reasonably be evaluated. Both parties believe that all of the information that will be presented at hearing on the NPOV is contained in the depositions already taken. One last step, regarding the choice of the 42 enforcement documents listed in the NPOV, remains for discovery. Given the limited information sought, the remaining discovery should take little time. The deposition of the MSHA representative should take only a few hours and the interrogatories will address only the facts that remain unanswered after that deposition. While a hearing on the notice has not been ruled out, the parties agree that all of the information that the court needs to make a decision regarding the NPOV will be contained in the record following the deposition and interrogatories that are both set to be complete in the coming weeks.

The Secretary has been slow in providing information during discovery and, as a result, has managed to drag on this dispute far too long. The September 16, 2015 hearing date is not particularly far off and still is nearly two years from the initial notice of pattern to the mine. The parties need to complete discovery 20 days prior to the hearing date. If the parties intend to have the validity of the NPOV decided on motions for summary decision, they must complete discovery and supplement the record with additional information so that the court can render a decision on the validity of the NPOV before the hearing date. At the end of the day, the court's order only requires the Secretary to turn over facts so that the court has all of the information necessary to determine if the Secretary did abuse his discretion in choosing this mine for a pattern of violations. Once that decision has been made, the court can turn its attention to looking at the notice itself and determining whether the notice demonstrates a pattern as alleged by the Secretary. While I do not disagree with the Secretary that this case in general presents novel and important issues, it is the court's opinion that interlocutory review of these issues will not materially advance the final disposition of these proceedings and, as a result, is inappropriate. The fact that a case involves a pressing issue does not necessarily justify interlocutory review of a court's order on that issue. *See Oak Grove Resources, LLC*, Docket Nos. SE 2013-301 et al., Unpublished Order dated June 23, 2015.

Accordingly, based on my above findings, the Secretary's Motion for Certification for Interlocutory Review is **DENIED**. For all of the reasons listed above, the Secretary's Motion for Stay is also **DENIED.**

Margaret A. Miller
Administrative Law Judge

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