

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 1, 2014

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

v.

The American Coal Company,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2011-13

Mine ID 11-02752

A.C. No. 1102752-000232235

Mine: New Era Mine

ORDER DENYING PETITIONER'S MOTION FOR CERTIFICATION FOR INTERLOCUTORY REVIEW

CERTIFICATION BY THE COURT UPON ITS OWN MOTION THAT ITS INTERLOCUTORY RULING INVOLVES A CONTROLLING QUESTION OF LAW

Before: Judge Moran

Order denying petitioner's motion for certification for interlocutory review

This matter involves, in part, the Secretary's Motion to Certify for interlocutory review this Court's May 13, 2014 Order Denying the Secretary's Motion for approval of settlement upon the Secretary's Motion for reconsideration. ("Motion to Certify"). A Motion to stay the May 13, 2014 Order accompanied the Motion to Certify.¹ For the reasons which follow, the Secretary's Motion to Certify is DENIED.

¹ Absent contrary direction from the Commission, the Secretary's accompanying motion to stay is denied. This is because, if interlocutory review is granted, a significant period of time may elapse between the time review is granted and a decision is issued. During that interval, of uncertain duration, witnesses may be lost, memories may fade and other evidentiary infirmities may ensue. It is noted that the provision addressing interlocutory review, 29 C.F.R. Section 2700.76, arguably anticipates such problems by providing: "Interlocutory Review by the Commission shall not operate to suspend the hearing *unless otherwise ordered* by the Commission." (emphasis added).

Concomitantly, the Court certifies upon its own motion that its interlocutory ruling involves a controlling question of law and that, in its opinion, immediate review will materially advance the final disposition of the proceeding.

In its Motion to Certify, the Secretary of Labor requested “that the Court certify, pursuant to 29 C.F.R. § 2700.76(a)(1)(i), that its May 13, 2014 Order involves three questions appropriate for the Commission's interlocutory appellate review.” The Secretary framed the issues it seeks for certification as follows:

“I. Does Section 110(k) provide any meaningful standards to limit the Secretary's prosecutorial discretion to settle Mine Act enforcement actions?

II. In the absence of any meaningful standard in Section 110(k), what standard of review applies when the Commission or a court of appeals reviews the Secretary's settlement agreements under Section 110(k)?

III. Does the settlement the Secretary proposes here satisfy the standard that applies?”

Motion to Certify at 3.

Each of these three questions posed for certification are **denied** because they ask the wrong questions and attempt to limit the scope of interlocutory review, should the Commission, in the exercise of its sound discretion, grant such review. The Secretary contended in its Motion to Certify that this Court did not answer the questions it posed and now it seeks to have the Commission answer those questions, again confining the questions in issue according to *its* terms. This is significant, because the “Scope of Review” subsection, § 2700.76(d), provides “Unless otherwise specified in the Commission’s order granting interlocutory review, *review shall be confined to the issues raised in the Judge’s certification or to the issues raised in the petition for interlocutory review.*”

Certification by the court upon its own motion that its interlocutory ruling involves a controlling question of law

As noted above, the Court certifies upon its own motion that its interlocutory ruling involves a controlling question of law and that, in its opinion, immediate review will materially advance the final disposition of the proceeding. The issues have already been clearly expressed by the Court in its May 13, 2014 Order Denying [the Secretary’s] Motion for Approval of Settlement upon the Secretary’s Motion for Reconsideration and need not be repeated here. That Order is incorporated by reference in this document. At its core, the Court’s May 13, 2014 Order involves the Commission’s role, and indeed its statutory duty, under section 110(k). The Secretary persists in its debilitating interpretation of that provision and it does this, despite the Commission’s decision in *Secretary of Labor v. Black Beauty Coal Co.*, 34 FMSHRC 1856,

2012 WL 4026640 (Aug. 2012), and in other decisions the Commission has issued, which clearly identify, and set forth, its review role under the statutory provision.

Here, the Secretary, disregarding the plain command of section 110(k), continues to assert that it “has the ‘prosecutorial discretion to negotiate percentage-reduction settlements’ and that it is under no obligation to do more than to announce that the Commission.” Order Denying Motion for Approval of Settlement upon Secretary’s Motion for Reconsideration at 10. As this Court observed, the Secretary’s Motion “asserts that the Commission’s approval authority is a ministerial task [and that] a uniform across-the-board reduction is within the Secretary’s authority to present to the Commission and [that] the Commission, [is] unauthorized to do anything except approve such a settlement, as long as it is clear and transparent to the public, [and that] the Secretary, without more, may always enter a uniform percentage reduction, apparently of any amount.” *Id.* at 11.

On the basis of the express words in section 110(k) of the Mine Act, the legislative history pertaining to that provision, and the decisions of the Federal Mine Safety and Health Review Commission, the Secretary is flatly incorrect about the asserted feeble nature of the Commission’s role in these matters.

Accordingly, the Court certifies that its interlocutory ruling involves a controlling question of law and, in the Court’s opinion, immediate review will materially advance the final disposition of the present case, and many others like it.

Denial of the Secretary’s Motion to Stay

As noted in footnote 1, the Court DENIES the Secretary’s Motion to stay. The parties are directed to participate in a conference call on July 15, 2014 at 1 p.m. EDT for the purpose of setting this matter for a prompt hearing. The parties are directed to email the Court confirming the date and time of this conference call. The Court will then provide call-in instructions for the call.

So Ordered.

William B. Moran

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing was served via email and certified mail on July 1, 2014:

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A handwritten signature in black ink, appearing to read 'Wykesha', with a long horizontal flourish extending to the right.

Wykesha Hodnett