

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

February 1, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2001-363-M
Petitioner,	:	A. C. No. 41-00009-05552
	:	
v.	:	Docket No. CENT 2001-364-M
	:	A. C. No. 41-00009-05553
CACTUS CANYON QUARRIES	:	
OF TEXAS, INC.,	:	
Respondent.	:	Mine: Fairland Plant & Quarry

## ORDER DENYING MOTION TO CERTIFY INTERLOCUTORY REVIEW

This case is now before me on Respondent's Motion to Certify a Ruling for Interlocutory Review by the Commission under Rule 76. The issues Respondent seeks to have the Commission review arise out of my decision to permit the Secretary to file these Petitions after the lapse of the 45 day period following notice of contest provided in Rule 28(a). My Order granting leave to file beyond the 45 day period was dated December 12, 2001. Respondent filed a motion to reconsider by Order and that motion was denied on December 28, 2001. Respondent filed motions addressed both to me and to the Commission seeking interlocutory review of my decision to permit the late filing of these Petitions. Counsel for the Secretary has now filed (January 25, 2002) a response to these motions for interlocutory review.

### Analysis

Under Rule 76, a Motion for Certification of Interlocutory Review poses two questions for the hearing Administrative Law Judge; (1) does the ruling sought to be reviewed involve a controlling question of law, and (2) will immediate review materially advance the final disposition of the proceeding. For reasons discussed at greater length below, my answer to both questions is negative.

In a pedestrian sense, any issue that has the potential to end a controversy can be said to be a "controlling" issue. In that sense, the Respondent appears to argue that the issue of timing of the filing of the Petition is a controlling issue which ought to be resolved in its favor before going on to the merits of the various citations of safety violations contained in the Petitions. What the Respondent fails to note in Rule 76 is the requirement that the issue be an issue of law, i.e. a question of interpretation of the law in the facts of the case. In this instance, no question of law is presented. It is clear that an Administrative Law Judge has great factual discretion in determining

whether to grant leave to file a Petition beyond the period established by the Rules of the Commission. While there are cases and opinions on the exercise of that discretion, it remains a factual rather than a legal issue and thus is not appropriate for interlocutory review. The point, if it has merit in the eyes of a subsequently reviewing body, has been preserved for any necessary subsequent appeal.

Further, it is my opinion that interlocutory review of this question would not materially advance the final disposition of this proceeding. Interlocutory review would, on the contrary, greatly delay the final disposition of this proceeding. Counsel for the Secretary has contributed a much more detailed account of the reasons for the small delays experienced in this case. While that detail was not necessary to convince me that adequate reasons for the delay existed, they make it clear to me that the probability of dismissal for delay under Rule 28 is so small as to be nonexistent. Affording the Respondent an interlocutory review at this time would serve no useful function.

I have pending before me four Petitions for Assessment of a Civil Penalty against Cactus Canyon Quarries, i.e. these two and two others. It is my intention, as soon as the issue of interlocutory review is resolved by the Commission, to conduct a prehearing conference in Austin, Texas, on all of these cases then pending before me in order to expedite a consolidated hearing on the merits. Further delays will be reduced to a bare minimum.

Therefore, it is

**ORDERED** that the Motion for Interlocutory Review is denied.

Irwin Schroeder  
Administrative Law Judge  
703-756-5232

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