

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001

April 1, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2002-80-M
Petitioner	:	A.C. No. 41-00009-05555
	:	
	:	Docket No. CENT 2002-124-M
	:	A.C. No. 41-00009-05556
	:	
	:	Docket No. CENT 2001-285-M
	:	A.C. No. 41-00009-05550
	:	
v.	:	Docket No. CENT 2001-286-M
	:	A.C. No. 41-00009-05551
	:	
	:	Docket No. CENT 2001-363-M
	:	A.C. No. 00009-05552
	:	
	:	Docket No. CENT 2001-364-M
	:	A.C. No. 41-00009-05553
	:	
CACTUS CANYON QUARRIES OF	:	Docket No. CENT 2001-379-M
TEXAS, INCORPORATED,	:	A.C. No. 41-00009-05554
Respondent	:	
	:	
	:	Mine: Fairland Plant and Quarries

**ORDER DENYING CERTIFICATION FOR
INTERLOCUTORY APPEAL**

By a Motion received on March 17, 2003, Respondent seeks to raise procedural and discovery issues before the Commission prior to a hearing on the merits of the allegations of safety violations. Under Commission Rule 2900.76, Respondent seeks immediate review by the Commission of my March 3, 2003 Order denying the Respondent's several motions to dismiss the Petitions for reasons generally related to delays in the initiation of these proceedings. On March 27, 2003, the Secretary filed a detailed Opposition to the Respondent's request. For the reasons briefly discussed below, I decline to certify my Order for interlocutory appeal.

Materially Advance Final Disposition

A Motion to Dismiss, by its very nature, is an attempt to bring a claim to an early disposition. It is an attempt to reach a final disposition without the need for examination of the merits of the asserted claim. Denial of a Motion to Dismiss is not normally appealable separate and apart from an appeal on a decision on the merits.

I am not persuaded the Respondent has made a compelling case that the issues raised in its request for interlocutory appeal certification are so decisive as to materially advance the final disposition. It makes no real attempt to assert prejudice from being required to complete a presentation on the merits prior to having an opportunity to present these issues to the Commissioners. Many of the assertions by the Respondent concern factual rather than legal matters and a more complete factual record would undoubtedly be helpful in any eventual appellate review.

Controlling Questions of Law

My order denying the Respondent's Motions to Dismiss states the controlling issues are mixed questions of law and fact. As the Secretary argues at some length, there are a great number of cases illustrating the sensitive balancing process involved in evaluating the argument that delay in pursuing a claim means the claim is lost. The appropriate standard of review on appeal would be a "substantial evidence" test for the factual questions and "clear error" on the legal questions. It is difficult to imagine an interlocutory appeal appropriately addressing the "substantial evidence" issue.

ORDER

For the foregoing reasons, the Motion for Certification of Interlocutory Appeal is denied.

Irwin Schroeder
Administrative Law Judge

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