

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

January 10, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2004-36
Petitioner	:	A.C. No. 46-08593-11714
	:	
v.	:	
	:	
BAYLOR MINING, INC.,	:	Jim’s Branch No. 3a
Respondent	:	

ORDER DENYING MOTION

FOR

CERTIFICATION OF RULING FOR INTERLOCUTORY REVIEW

This case is before me on a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). On August 18, 2004, I granted, in part, and denied, in part, a motion of the Respondent to compel the Secretary to furnish certain documents. *Baylor Mining, Inc.*, 26 FMSHRC 739 (Aug. 2004). On November 8, 2004, the Secretary’s motion for partial reconsideration of that order was denied. *Baylor Mining, Inc.*, 26 FMSHRC 905 (Nov. 2004). The Secretary has now filed a Motion for Certification of Interlocutory Ruling for Review. The Respondent has filed a response in opposition to the motion. For the reasons set forth below, the Secretary’s motion is denied.

At issue is an order “that the Secretary furnish the names of her miner witnesses to the Respondent two days before the hearing and that at the same time, the Secretary provide to the Respondent the statements, including memoranda of interview, of any miners who will be witnesses.” *Id.* at 907 (footnote omitted). This order does not meet either of the criteria in the Commission’s rules for interlocutory review.

Commission Rule 76, 29 C.F.R. § 2700.76, controls requests for interlocutory review. Rule 76(a)(1)(i), 29 C.F.R. § 2700.76(a)(1)(i), provides that review cannot be granted unless the “Judge has certified, upon his own motion or the motion of a party, that his interlocutory ruling involves a controlling question of law and that in his opinion immediate review will materially advance the final disposition of the proceeding.” This order does not involve a controlling question of law, nor will its immediate review materially advance final disposition of the proceeding.

The order does not involve a controlling question of law because the Commission has already ruled that the names of miner witnesses, along with any statements they may have made,

must be furnished to the Respondent. In *Asarco, Inc.*, 14 FMSHRC 1323, 1331 (Aug. 1992), the Commission observed “that Asarco will be able to obtain the names of the Secretary’s witnesses two days before the trial and that any statement of a miner who is called may be obtained for the purpose of refreshing his recollection or impeaching his credibility at the trial.” In a subsequent case, the Commission specifically stated that “the judge may at trial order disclosure of informants’ statements” even if the statements, as here, had previously been determined not to be discoverable, *Sec’y of Labor on behalf of Gregory v. Thunder Basin Coal Co.*, 15 FMSHRC 2228, 2237 (Nov. 1993). Therefore, I conclude that the Secretary’s motion does not meet the first requirement for interlocutory review.

The Secretary claims that immediate review of the order will materially advance final disposition of the proceeding, but does not state how. It is difficult to discern how it would. If the statements are furnished as ordered, the case will proceed to trial. If the order is reversed and the statements are not furnished, the case will still proceed to trial. Granting interlocutory review will only delay the case, not materially advance its final disposition. Consequently, I conclude that the Secretary has not met the second requirement for interlocutory review.

Certification of a ruling for interlocutory review can only be granted if the ruling involves both a controlling question of law and immediate review of the ruling will materially advance the final disposition of the proceeding. The ruling in this case involves neither. Accordingly, the motion for certification is **DENIED**.

T. Todd Hodgdon
Administrative Law Judge
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