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SOL (MSHA) V. W.S. FREY
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SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. VA 93-59-M
	:	VA 93-80-M
W.S. FREY COMPANY, INC.	:	VA 93-89-M

BEFORE: Jordan, Chairman; Backley, Doyle and Holen, Commissioners

ORDER

BY THE COMMISSION:

On July 5, 1994, W.S. Frey Co., Inc. ("Frey") filed with the United States Court of Appeals for the Fourth Circuit a petition for review of the decision of Administrative Law Judge David F. Barbour in this matter. (No. 94-1860); 16 FMSHRC 975 (April 1994)(ALJ).(FOOTNOTE 1) On that same day, Frey filed with the Commission a Motion for Stay Pending Appeal asserting that it has "exhausted all administrative remedies available," that it "has filed a petition for review" with the Fourth Circuit, and that it will request the Court to set aside the judge's decision. The Secretary has opposed Frey's motion on the grounds that Frey failed to address any of the elements required for a stay.

Frey's motion was made pursuant to Rule 18 of the Federal Rules of Appellate Procedure, which provides that "[a]pplication for a stay of a decision or order of an agency pending direct review in the court of appeals shall ordinarily be made in the first instance to the agency." Section 106(a)(1) of the Mine Act, 30 U.S.C. 816(a)(1), states that, upon appeal of a final decision of the Commission, the court of appeals shall have exclusive jurisdiction in the proceeding at such time as the record before the Commission is filed with the court. Because the record has not yet been filed, the Commission has jurisdiction to consider Frey's motion. Secretary on behalf of Smith v. Helen Mining Co., 14 FMSHRC 1993, 1994 (December 1992).

In Secretary on behalf of Price and Vacha v. Jim Walter Resources, Inc., 9 FMSHRC 1312 (August 1987), the Commission held that a party seeking a stay must satisfy the factors in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). Those factors include: (1) likelihood of prevailing on the merits of the appeal; (2) irreparable harm if the stay is not granted; (3) no adverse effect on other interested parties; and (4) a showing that the stay is in the public interest. Virginia Petroleum, 259 F.2d at 925. The court made clear that a stay constitutes "extraordinary relief." Id.

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1 The Commission did not direct review of the judge's decision and it became a final decision of the Commission pursuant to 30 U.S.C. 823(d)(1).

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Upon consideration of Frey's motion and the Secretary's opposition, we conclude that Frey has failed to show the factors justifying stay of an agency order pending judicial review. Accordingly, Frey's motion is denied.

Mary Lu Jordan, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner