

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 10, 2011

SECRETARY OF LABOR,	:	Docket Nos. PENN 2009-775
MINE SAFETY AND HEALTH	:	PENN 2009-825
ADMINISTRATION (MSHA)	:	PENN 2010-63
	:	PENN 2010-191
v.	:	PENN 2010-275
	:	PENN 2010-291
SHAMOKIN FILLER COMPANY, INC.	:	PENN 2010-381
	:	PENN 2010-465
	:	PENN 2010-515
	:	PENN 2010-745
	:	PENN 2011-16
	:	PENN 2011-104
	:	PENN 2011-129
	:	PENN 2011-189

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY: Commissioners Duffy, Young, and Cohen

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). In this order, we address three particular requests pending in this matter.

First, on June 9, 2011, Shamokin Filler Company, Inc. (“Shamokin”) filed a petition for reconsideration pursuant to Commission Procedural Rule 78, 29 C.F.R. § 2700.78. Shamokin seeks reconsideration of an order issued by the Commission on June 2, 2011, denying Shamokin’s petition for interlocutory review of Judge John Kent Lewis’s March 11, 2011 order. In his order, the judge determined that Shamokin’s carbon plant is under the regulatory jurisdiction of the Mine Safety and Health Administration (“MSHA”). 33 FMSHRC 725 (Mar. 2011) (ALJ).

Second, on July 29, 2011, the Secretary filed an unopposed petition for interlocutory review pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76. This petition seeks

review of a June 23, 2011 order which denied a joint motion for reconsideration issued by Judge Lewis. The June 23, 2011 order denied a joint motion by the Secretary and Shamokin to reconsider the judge's May 20, 2011 Notice of Hearing and Order to File a Prehearing Report, which required the parties to submit all direct examination in the form of written affidavits. Specifically, the May 20, 2011 order instructed the parties to

submit all direct examination of each witness in written form at least 48 hours prior to the hearing. The direct examination shall be in the form of an affidavit, signed under oath and shall include only items that are appropriate for direct examination of the witness. All exhibits used by the witness must be numbered (or lettered) and attached to the direct testimony. The witness must appear at hearing and will be subject to cross-examination and redirect examination only. The parties may present, at hearing, any objection to the written direct examination or attached exhibits. Failure to include a witness, to provide the written direct examination or failure to include an exhibit or to specify in detail the items that remain in dispute, **will** result in their exclusion at hearing.

Prehearing Order at 3 (emphasis in original).¹

Third, on July 29, 2011, the Secretary also filed an unopposed motion for expedited consideration of its petition for interlocutory review and an unopposed motion to stay the proceedings below. Trial is scheduled for September 6, 2011.

A. The Petition for Reconsideration

On April 6, 2011, Shamokin had filed a petition for discretionary review seeking review of the judge's March 11, 2011 order. The Commission determined that the order was not a final decision that ended the judge's jurisdiction over this matter and that, although he resolved the jurisdictional issue and determined that Shamokin's carbon plant is under the regulatory jurisdiction of MSHA, he made no findings regarding the violations and penalties at issue. As a result, the Commission ruled on April 8, 2011, that Shamokin's petition was not a valid petition for discretionary review of a final decision under section 113(d) of the Mine Act, 30 U.S.C. § 823(d).

On April 8, 2011, Shamokin filed a motion for certification of interlocutory review with Judge Lewis, which was denied on April 12, 2011. On April 25, 2011, Shamokin filed a petition for interlocutory review with the Commission pursuant to Rule 76, seeking review of Judge

¹ On July 18, 2011, the judge denied the Secretary's unopposed motion to certify the issue for interlocutory review.

Lewis' March 11, 2011 order. As noted above, the Commission denied the petition on June 2, 2011, and Shamokin then filed the petition for reconsideration.

In considering both Shamokin's petition for reconsideration of our previous order denying its petition for interlocutory review and the Secretary's petition, we look to the criteria set forth in Commission Procedural Rule 76 for granting a petition for interlocutory review. That rule states that such review may be granted "upon a determination that the Judge's interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding." Commission Procedural Rule 76(a)(2), 29 C.F.R. § 2700.76(a)(2).

The Commission considers the petition for reconsideration pursuant to Commission Procedural Rule 78, 29 C.F.R. § 2700.78. *See Island Creek Coal Co.*, 23 FMSHRC 138 (Feb. 2001). Shamokin's motion in effect requests that we rule on the jurisdictional issue prior to trial. Shamokin contends that the jurisdictional issue is a controlling question of law. Shamokin also contends that the language "as is usually done by the operator of the coal mine" in section 3(i) of the Act, 30 U.S.C. § 802 (i), excludes Shamokin's facility because it only purchases coal that has been prepared for market. Pet. for Recons. at 1-2.

The petition for reconsideration brought to the attention of the Commission, for the first time, the fact that "there are currently pending approximately 14 civil penalty dockets and 77 notice of contest dockets involving 78 Citations and Orders, which have been challenged [by Shamokin] both on the basis of lack of jurisdiction and for factual reasons." *Id.* at 3 (footnote omitted). The petition further avers that "resolution of the legal question of jurisdiction is necessary before the parties can engage in settlement efforts both for this docket and any of the other dockets currently pending before the Review Commission." *Id.* Additionally, attached to the petition for reconsideration is a copy of the Secretary's response to Shamokin's motion to certify the decision for interlocutory review, filed before the judge. In this document, the Secretary states that

resolving the issue of jurisdiction in this matter with finality is likely to materially advance the final disposition of both this proceeding and others involving Respondent. . . . Until jurisdiction over the Carbon Plant is resolved, meaningful settlement negotiations concerning all these matters cannot take place As a result, a rapid resolution of the jurisdictional issue in this matter is likely to promote resolution of many cases without further protracted litigation.

Sec'y's Resp. to Mot. to Certify at 1-2.

We now conclude that immediate resolution of the jurisdictional issue is a controlling question of law which would materially advance the final disposition of these proceedings, as

provided in Rule 76(a)(2). Hence, in the interest of judicial economy, we grant the petition for reconsideration and grant interlocutory review of the judge's ruling on the jurisdictional issue.

B. The Secretary's Petition for Interlocutory Review

We now turn to the Secretary's unopposed petition for interlocutory review of Judge Lewis's notice of hearing and order to file prehearing report. The Secretary argues that the requirement that all parties submit all direct examination testimony in the form of written affidavits in the upcoming trial denies both parties the opportunity to present oral direct testimony in violation of section 556(d) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 556(d) and Commission Procedural Rule 63, 29 C.F.R. § 2700.63, which gives the "parties the right to determine the form of evidence." Sec'y's Pet. at 3. The Secretary contends that the issues presented in its petition are "pure legal issues" and "matters of first impression" for the Commission. *Id.*

In addition, the Secretary notes that controlling questions of law may involve practical concerns which have an impact on how the litigation is to be conducted. *Id.* at 4. The Secretary cites several such practical concerns. For example, the Secretary notes that "[t]he written direct testimony requirement presents the parties with significant obstacles to introducing documentary evidence, such as maps or diagrams, which might assist the Court in its understanding of the issues." *Id.* at 10. We conclude that the issue regarding written direct testimony involves practical procedural questions, the resolution of which will materially advance the final disposition of the case and should be resolved prior to the beginning of the trial. Accordingly, we grant the Secretary's petition for interlocutory review.

C. Request for Expedited Consideration and Stay of Proceedings

The Secretary has requested expedited consideration on whether to grant her petition for interlocutory review.² She has also asked the Commission to stay the proceedings below pending a decision on the issues she presented for interlocutory review in light of the trial date set for September 6, 2011, and the parties' need to prepare for the trial. The motion for stay is hereby granted.

² This request for expedition is now moot.

Accordingly, for the reasons set forth above, Shamokin’s petition for reconsideration is granted, and its petition for interlocutory review is granted. The Secretary’s petition for interlocutory review and motion to stay are also granted.³ Proceedings in this case before the administrative law judge are stayed pending further order of the Commission. Briefing in this matter before the Commission is also stayed pending further order of the Commission.

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

³ Chairman Jordan and Commissioner Nakamura would deny Shamokin’s petition for reconsideration and the Secretary’s petition for interlocutory review but would grant the Secretary’s motion to stay proceedings pending Commission review in light of the fact that review has been granted.

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