

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

November 23, 2010

JUSTIN NAGEL

:

v.

:

Docket No. WEST 2010-464-DM

:

NEWMONT USA LIMITED

:

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

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

On January 5, 2010, Justin Nagel, acting *pro se*, filed a complaint of discrimination against Newmont USA Limited (“Newmont”) under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (2006). The case had a complex procedural history before the Administrative Law Judge (“the judge”), which culminated on October 27, 2010, when the judge issued an order entitled, “Order Certifying Interlocutory Discovery Ruling to the Commission; Order Granting Respondent’s Motion to Dismiss for Failure to Comply with Discovery Orders and Repeated Lack of Candor with Tribunal; Order Staying Dismissal Pending Commission Ruling on Certified Interlocutory Discovery Order.” We will refer to this combined order as the “October 27 Dismissal Order.” In this Direction for Review and Order, the Commission will consider whether to address two issues which Mr. Nagel has raised before the Commission, and will also address the legal implications of the Judge’s attempt to stay the October 27 Dismissal Order.

I.

Factual and Procedural Background

On September 24, 2010, the judge orally granted Newmont’s oral request that it be allowed to hire private security guards for the scheduled September 28, 2010 deposition of Mr. Nagel, and that all participants in said deposition submit to a reasonable search upon entry. This oral order was confirmed by a written Order Granting Respondent’s Request for Security on October 13, 2010. Mr. Nagel filed a document entitled “Petition for discretionary review” with the Commission on October 26, 2010. In his October 27 Dismissal Order, the judge treated this

submission as a motion to certify this interlocutory ruling¹ under Commission Procedural Rule 76, 29 C.F.R. § 2700.76. He declined to certify the issue for interlocutory review, stating that the order did not materially advance the final disposition of the proceeding and was moot because the deposition had already occurred. Oct. 27 Dismissal Order at 17.

In addition, after a protracted discovery dispute involving recordings Mr. Nagel had made of conversations with representatives of Newmont management, the judge on October 18, 2010 issued an order partially granting Newmont's motion to compel production of the recorded conversations. Although the judge ordered Mr. Nagel to produce copies of the audio tapes of in-person conversations with Newmont management (but not tapes of telephone conversations), Mr. Nagel did not comply with this order. Oct. 27 Dismissal Order at 5-6. On October 19, 2010, Newmont filed a motion to dismiss, arguing that Mr. Nagel had demonstrated a pattern of unwillingness to comply with direct orders from the judge. Oct. 27 Dismissal Order at 6. During a conference call on October 21, 2010, the judge issued an order to show cause why the case should not be dismissed due to Mr. Nagel's failure to comply with the discovery order to produce the tapes. This was followed by a written show cause order issued on October 22. *Id.* at 11. Mr. Nagel responded to the motion to dismiss, stating that he intended to appeal the discovery order to the Commission. *Id.* at 10.

On October 25, 2010, Mr. Nagel filed a Petition for Discretionary Review, asking the Commission to review the judge's order requiring him to turn over copies of the audio recordings. As with the petition relating to the hiring of private security guards, the judge treated this document as a motion for certification of his interlocutory discovery ruling. Unlike the issue of the private security guards, however, the judge ruled that the order to turn over the tapes involved a controlling question of law that would materially advance the final disposition of the proceeding, and certified the question to the Commission for interlocutory review. *Id.* at 16-17.

In his October 27 Dismissal Order, the judge discussed whether dismissal of the case as a

¹ An interlocutory ruling is an order issued during the pendency of a lawsuit, prior to the final decision in the case. Generally, the Commission is reluctant to review interlocutory rulings because such review is inefficient, and interferes with the flow of the case before the judge. Interlocutory rulings can generally be reviewed after the judge has issued a final decision as part of an overall appeal to the Commission. For this reason, the Commission has enacted separate regulations addressing review from a judge's final decision and review from a judge's ruling prior to his final decision. Thus, Commission Procedural Rule 70, 29 C.F.R. § 2700.70, addresses "Petitions for discretionary review," which is the procedure used to obtain review of a judge's final decision. Where a party seeks review of a judge's interlocutory ruling, it may file a "petition for interlocutory review" under Commission Procedural Rule 76, 29 C.F.R. § 2700.76. However, petitions for interlocutory review are granted only under very narrow circumstances. Piecemeal appeals are usually not favored, as they often result in additional costs to the parties and the judiciary. Certification of an interlocutory order is considered an exception, not a rule. 20 James Wm. Moore et al., *Moore's Federal Practice* ¶ 305.03 (3d ed. 2010).

discovery sanction was appropriate. He held that it was appropriate, due to Mr. Nagel's "repeated failure to comply with discovery Orders and lack of candor with the tribunal, which has interfered substantially with a fair hearing in this matter, unduly burdened the record, and caused additional work, delay, and expense through refusal to comply with discovery Orders and Commission rules." *Id.* at 18. He dismissed the case but stayed the dismissal pending the Commission's ruling on the certified interlocutory discovery ruling. *Id.* at 23.

II.

Disposition

Before considering Mr. Nagel's two petitions, we must first consider the legal implications of the judge staying the October 27 Dismissal Order. In *Capitol Aggregates, Inc.*, 2 FMSHRC 1040, 1041 (May 1980), the Commission held that a judge who had issued a stay of his decision lacked the authority to issue the stay. *See also Sec. of Labor on behalf of Pasula v. Consolidation Coal Co.*, 1 FMSHRC 25 (Apr. 1979) (neither the Mine Act nor the Commission's Interim Rules of Procedure provide for a stay of the effective date of a judge's decision once the decision is issued).² Thus, if the judge in the present case lacked the authority to issue the stay, the effect is that the October 27 Dismissal Order was a final decision which commenced the running of the 30-day period in which a party may file a petition for discretionary review under section 113(d)(2)(A)(i) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(i), and Commission Procedural Rule 70(a), 29 C.F.R. § 2700.70(a). Because of the stay, Mr. Nagel is not on notice that his time for filing a petition for discretionary review from the October 27 Dismissal Order is running.

For this reason, the Commission will, on its own motion pursuant to Commission Procedural Rule 71, 29 C.F.R. § 2700.71, review the October 27 Dismissal Order. Our review is limited to the issue of whether the judge had the authority to stay the effect of his decision. We conclude that he did not have this authority. *Capitol Aggregates, Inc.*, *supra* at 1041. Therefore, we must vacate the October 27 Dismissal Order.

We have before us Mr. Nagel's two petitions. Although these are styled as petitions for discretionary review under Rule 70, they are really – as the judge recognized – petitions for interlocutory review under Rule 76. Although the judge certified to the Commission, pursuant to Rule 76(a)(1)(i), the issue involving the partial granting of Newmont's motion to compel production of audio tape recordings, which was appealed by Mr. Nagel in one of his petitions, we conclude that review of these issues is not appropriate at this time. We note that the Commission usually does not grant interlocutory review of discovery orders. *See Asarco, Inc.*, 14 FMSHRC 1323, 1328 (Aug. 1992) ("unless there is a 'manifest abuse of discretion' on the part of a judge, discovery orders are not ordinarily subject to interlocutory appellate review") (citations omitted);

² Commission Rule 69(b) states that, except for the correction of clerical errors, "the jurisdiction of the Judge terminates when his decision has been issued." 29 C.F.R. § 2700.69(b).

In re: Contests of Respirable Dust Sample Alteration Citations, 14 FMSHRC 987, 1004 (June 1992) (“discovery orders are usually not appealable”). Accordingly, we deny both petitions.

III.

Conclusion

Consequently, we vacate the judge’s Dismissal Order of October 27, 2010, and remand the case to him for further proceedings consistent with this decision. Once the judge has issued a final decision, a petition for discretionary review of that decision may be filed within 30 days after issuance of the decision or order, pursuant to section 113(d)(2)(A)(i) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(i), and the Commission’s Procedural Rule 70(a), 29 C.F.R. § 2700.70(a). If Mr. Nagel files a petition for discretionary review, he may include the issues set forth in his interlocutory petitions on the security and discovery issues.³

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

³ On November 19, 2010, the Commission received from Mr. Nagel another petition for discretionary review, which asked the Commission to review the judge’s denial, on October 20, 2010, of Mr. Nagel’s Motion to Order Respondent to Reduce Verbal Motion to Writing. As with the other two petitions, we find it inappropriate to review this ruling on an interlocutory basis. Therefore, we deny this petition. Mr. Nagel may raise this issue in the context of a petition for discretionary review after the judge has issued a final decision in the overall case.

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