

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR
WASHINGTON, D.C. 20006

March 15, 1995

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. LAKE 94-72, etc.
	:	
BUCK CREEK COAL INC.	:	

ORDER

On February 17, 1994, Buck Creek Coal Inc. (ABuck Creek@) filed with the Commission a petition for interlocutory review of Administrative Law Judge T. Todd Hodgdon's February 15, 1995, Order Continuing Stay (the AStay Order@). The judge had previously stayed proceedings for ninety days or until the United States Attorney made a determination regarding the criminal prosecution of Buck Creek. See *Buck Creek Coal Inc.*, 17 FMSHRC __ (February 1995) (Operator's petition for interlocutory review of the previous stay dismissed as moot). The Stay Order continues the stay until May 16, 1995, and directs the parties to attend a status conference on that date for the purpose of deciding whether and under what conditions the stay should be continued. Stay Order at 5.

Buck Creek urges the Commission to grant interlocutory review and relief from the Stay Order so that it can begin to defend itself against the 554 citations and orders in these consolidated dockets. Pet. at 4. The Secretary responds that Commission Procedural Rule 76(a)(1), 29 C.F.R. ' 2700.76(a)(1),¹ precludes our granting interlocutory review because the

¹ Rule 76 states in part:

(a) Procedure. Interlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission.

(1) Review cannot be granted unless;

(i) 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; or

(ii) The Judge has denied a party's motion for certification of the interlocutory ruling to the Commission, and the party files with the Commission a petition for interlocutory review within 30

judge has not certified his ruling, nor has he denied Buck Creek's motion for certification. Opp'n at 3-4. In reply, Buck Creek urges the Commission to construe the Stay Order as an ongoing denial of Buck Creek's previously-filed petition for interlocutory review. Reply at 2. Buck Creek asserts in the alternative that application to the judge for certification would be futile and therefore should not be required. Buck Creek notes that it has now filed a motion for certification with the judge. *Id.* at 2-3 & n.2.

Rule 76 provides that interlocutory review cannot be granted unless the judge has certified his interlocutory ruling to the Commission or has denied a party's motion for certification. We conclude that it would be inappropriate to rule on the Secretary's procedural argument in advance of the judge's determination of Buck Creek's pending motion.

Accordingly, we hold in abeyance our ruling on Buck Creek's petition pending the judge's determination of the motion for certification. *Cf. Emery Mining Corp.*, 11 FMSHRC 1, 3 (January 1989).

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

days of the Judge's denial of such motion for certification.