FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 27, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. PENN 97-20-RM through 97-25-RM
MEDUSA CEMENT COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners[1]

DECISION

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

[1] Commissioner Beatty assumed office after this case had been considered at a decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.,* 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Beatty has elected not to participate in this matter.

This is an interlocutory review of an order issued by Administrative Law Judge Jerold Feldman denying a motion for recusal[2] filed by Medusa Cement Company (AMedusa@) in a consolidated contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@). Pursuant to Commission Procedural Rule 76(a)(1)(i), 29 C.F.R. ' 2700.76(a)(1)(i), the judge certified for interlocutory review the order denying the recusal motion, and the Commission granted Medusa=s petition for interlocutory review. For the reasons that follow, we affirm the judge=s order denying recusal.

I.

Factual and Procedural Background

This proceeding involves several consolidated contests in which Medusa challenged the citations and abatement periods. Following the notices of contest, the cases were assigned to Judge Feldman. The proceeding was stayed while settlement negotiations between counsel for Medusa and representatives of the Mine Safety and Health Administration (AMSHA@) were

[2] The Commission=s procedural rule governing recusal, 29 C.F.R. ' 2700.81, provides as follows:

> ' 2700.81 Recusal and disqualification.
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> (a) *Recusal.* A Commissioner or a Judge may recuse himself from a proceeding whenever he deems such action appropriate.
>
> (b) *Request to withdraw.* A party may request a Commissioner or a Judge to withdraw on grounds of personal bias or other disqualification. A party shall make such a request by promptly filing an affidavit setting forth in detail the matters alleged to constitute personal bias or other grounds for disqualification.
>
> (c) *Procedure if Commissioner or Judge does not withdraw.* If, upon being requested to withdraw pursuant to paragraph (b) of this section, the Commissioner or the Judge does not withdraw from the proceeding, he shall so rule upon the record, stating the grounds for his ruling. If the Judge does not withdraw, he shall proceed with the hearing, or, if the hearing has been completed, he shall proceed with the issuance of his decision, unless the Commission stays the hearing or further proceedings upon the granting of a petition for interlocutory review of the Judge=s decision not to withdraw.

ongoing. Order Granting Mot. for Cert. at 1 (January 29, 1997). After the collapse of those negotiations, Medusa=s counsel, Henry Chajet and Paul Wilson of the Patton Boggs law firm, filed a Motion to Recuse in which they argued that the judge should recuse himself.

The motion stated that in *Rock of Ages Corp.*,17 FMSHRC 1925 (November 1995) (ALJ), *aff=d in pertinent part,* 20 FMSHRC ____, Nos. YORK 94-76-RM through 94-83-RM (February 24, 1998), the judge demonstrated Aopen hostility towards the party, its witnesses and particularly, his personal bias towards its counsel@ (Henry Chajet) (hereinafter Acounsel for ROA@), and interfered Awith counsel=s presentation of evidence.@ M. Mot. at 1. The motion requested that the proceeding be reassigned to a different judge. *Id*. In the event the judge denied the motion, Medusa asked that the matter be certified for interlocutory review. *Id.* at 1-2. The Secretary opposed the motion, arguing that the grounds for recusal were meritless and

further stating that Medusa=s lead attorney was Paul Wilson, who had not alleged any bias against himself. S. Opp=n at 1-3.

On December 2, 1996, the judge denied the motion to recuse. In his order, the judge stated:

> During the *Rock of Ages* proceeding, counsel engaged in provocative conduct, pursued lines of questioning deemed to be irrelevant, and examined the Secretary=s witnesses in an aggressive manner. The bench rulings throughout *Rock of Ages* were necessary to discharge the judge=s responsibilities to regulate the course of the hearing, to rule on offers of proof, and to ensure that only relevant evidence was received.

Order Denying Mot. to Recuse at 1 (December 2, 1996) (citations omitted).

On January 29, 1997, the judge granted Medusa=s motion to certify the ruling for interlocutory review. In certifying the order, the judge noted that he had denied the motion for recusal Abecause regulating the course of the hearing, and making bench rulings on evidentiary matters, are fundamental duties of a presiding judge that do not support a claim of judicial bias.@ Order Granting Mot. for Cert. at 2 (January 29, 1997).

II.

Disposition

Medusa argues that the Commission should reassign the case to another judge to avoid either bias or the appearance of bias. M. Br. at 1. Medusa states that its counsel had experienced the judge=s Apersonal bias@ during the trial in *Rock of Ages* and that he had submitted a brief to the Commission seeking reversal of the judge=s decision because, among other errors, he had improperly and unfairly conducted the trial. *Id.* at 2.

As grounds for recusal, Medusa relies on the judge=s conduct in *Rock of Ages* and submits pages and an appendix from the operator=s brief in that case. In its brief, Rock of Ages (AROA@) argued that the judge committed reversible error by his conduct of the hearing. *Id.* at Attach. 3 & 4. This conduct purportedly included interrupting the presentation of evidence Ain an attempt to steer the case toward a predetermined conclusion,@ interjecting repeatedly during counsel for ROA=s cross-examination, taking over his cross-examination of witnesses (thereby giving advance notice of his theories and preventing Acold@ cross-examination of witnesses), encouraging witnesses to state opinions adverse to ROA, misstating legal issues, encouraging counsel for ROA to withdraw objections to the way the hearing was being conducted, and refusing to strike the testimony of a witness who conferred with another witness. *Id.* at 3-4. Medusa argues that the judge never assumed the role of a Aneutral arbiter@ and that the judge=s displeasure with counsel

assertedly increased with the filing of the brief with the Commission in the *Rock of Ages* appeal. *Id.* at 5. As further support for the assertion that the judge was biased, Medusa relies on the objections of ROA=s counsel to the judge=s conduct of the hearing and the response of the judge, who admonished counsel for ROA for throwing his glasses during an off-the-record conference. *Id.* at 6-10. Medusa asserts that the Commission=s precedent allows it to take a commonsense approach and reassign a case when relations between the judge and counsel create bias or the appearance of bias. *Id.* at 13-14. As attachments to its brief, Medusa submitted affidavits from counsel for ROA in which he swore that AJudge Jerold Feldman bears personal bias against me.@ *Id.* at Attach. 1 & 2.

The Secretary refutes the allegations of bias in *Rock of Ages*, relying on attached pages from her brief in that case. S. Br. at 4 & Attach. A. The Secretary further argues that the judge=s conduct was insufficient grounds for recusal under the Supreme Court=s decision in *Liteky v. United States*, 510 U.S. 540 (1994). S. Br. at 4-5. The Secretary asserts that there is a lack of supporting evidence of bias or evidence that the judge would act with bias in this case. *Id.* at 6-9. The Secretary requests that the Commission affirm Judge Feldman=s decision not to recuse himself. *Id.* at 13.

In reply, Medusa asserts that the Commission should review the judge=s denial of recusal *de novo*, rather than under the abuse of discretion standard suggested by the Secretary. M. Reply Br. at 2-3. In its reply brief, Medusa moved to strike that portion of the Secretary=s brief, which alleged that one of the counsel for Medusa (Chajet) Aha[d] >made a practice= of making meritless accusations of impropriety against Judges, opposing counsel and parties.@ *Id.* at 5-10. The Secretary opposed Medusa=s motion to strike, noting that her assertions regarding that attorney=s conduct were based on official records and findings. S. Opp=n to Mot. to Strike at 1.

The standard of review governing recusal matters has been previously addressed by the Commission. In *Big Horn Calcium Co.*, 12 FMSHRC 1493 (August 1990), the Commission was asked to review a judge=s withdrawal from a case and termination of a hearing. The Commission held that the recusal of one judge and reassignment of a matter to a new judge was reviewed under Aan abuse of discretion@ standard. *Id.* at 1496. The use of an abuse of discretion standard for recusal issues is consistent with the discretion accorded judges in other discretionary matters related to the conduct of trial. *E.g., In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1843-44, 1853 and 1864 (November 1995) (qualification and crediting of expert witnesses; exclusion of trial testimony), *appeal docketed sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, No. 95-1619 (D.C. Cir. Dec. 28, 1995); *Buck Creek Coal, Inc.*, 17 FMSHRC 500, 503 (April 1995) (stay of proceedings); *Asarco, Inc.*, 14 FMSHRC 1323, 1327-28 (August 1992) (discovery orders). We reject Medusa=s contention, Reply Br. at 2-3, that section 113(d)(2)(C) of the Mine Act, 30 U.S.C. ' 823(d)(2)(C), establishes that the

Commission has *de novo* review authority over recusal decisions of administrative law judges.[3]

The issue of the judge=s recusal in this proceeding based on his rulings and conduct in *Rock of Ages* must be considered in light of Commission decisions that address the role of the judge at trial. The Commission has recognized that, Aa judge is an active participant in the adjudicatory process and has a duty to conduct proceedings in an orderly manner so as to elicit the truth and obtain a just result.@ *Secretary of Labor on behalf of Clarke v. T.P. Mining, Inc.*, 7 FMSHRC 989, 993 (July 1985). The Commission has noted, however, in reversing a judge=s *sua sponte* post-hearing joinder of a party, that A[t]he role of the Commission and its judges is to adjudicate, not to litigate cases **C** a procedural axiom followed by this Commission from its formation.@ *Lonnie Jones v. D&R Contractors*, 8 FMSHRC 1045, 1053 (July 1986) (citation omitted). Also, in *Canterbury Coal Co.*, 1 FMSHRC 1311 (September 1979), the Commission reversed the decision of an administrative law judge and remanded the case for reassignment to a new judge. *Id.* at 1314. Acknowledging Athe considerable leeway afforded administrative law judges in regulating the course of a hearing and in developing a complete and adequate record,@ the Commission concluded that the judge interjected himself in the proceedings Aso often and so extensively that [the parties] were denied the opportunity to develop their case.@ *Id.* at 1312-13.

[3] Section 113(d)(2)(C) provides only that the Commission is to Aaffirm, set aside, or modify@ a judge=s decision based on the Arecord@ in the proceeding; it does not set forth the standard of review to be applied. Nor does the fact that the Commission can decide issues of Alaw, policy [and] discretion,@ M. Reply Br. at 3 (quoting 30 U.S.C. ' 823(d)(2)(A)), support Medusa=s contention that the Commission should review a judge=s decision on recusal *de novo*.

In addition to Commission cases, both parties rely on the extensive body of federal cases dealing with disqualification of judges. In *Liteky*, the Supreme Court recently interpreted the statutory provisions in Title 28 of the U.S. Code.[4] In that case, the petitioners alleged that the judge violated 28 U.S.C. ' 455(a) in refusing to recuse himself because of his conduct in an earlier trial involving one of the petitioners. 510 U.S. at 542-43. In examining the history and meaning of sections 144 and 455(a) and (b), the Court distinguished between a judge=s opinions derived from Aextrajudicial source[s]@ and those derived from a prior judicial proceeding. *Id*. at 550-51. The Court held:

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. . . . [T]hey cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of . . . current . . . or . . . prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or

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[4] Title 28 provides in relevant part:

> ' 144. Bias or prejudice of judge
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> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> ' 455. Disqualification of justice, judge, or magistrate
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> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .

> antagonism that would make a fair judgment impossible. Thus, judicial remarks during the course of trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.

Id. at 555 (citation omitted). The Court determined that the lower court=s rulings, statements (assertedly made with an anti-defendant tone), and admonishments of counsel and parties (whether legally supportable or not) were inadequate grounds for recusal, because all occurred in the course of judicial proceedings, and none displayed deep-seated and unequivocal antagonism that would render fair judgment impossible. *Id.* at 556.

There is no question that the judge took an active role in the *Rock of Ages* proceeding at trial. He frequently asked questions of witnesses to clarify his understanding of the issues under examination and to expedite the lengthy trial. He interrupted the examination of witnesses to encourage the parties to stipulate to issues and shorten the examination. In addition, the judge announced to counsel what, in his view, were the significant issues in the case, to allow them to tailor their examination of witnesses. Generally in response to objections from the Secretary=s

counsel, the judge cut off ROA=s counsel=s use of hypothetical questions that strayed too far from the facts of the case. On occasion, the judge admonished ROA=s counsel to maintain the decorum of the proceeding.

Under the relevant Commission rule and caselaw and analogous federal statute and cases, we conclude that there is no basis for Medusa=s motion requesting the judge to recuse himself.[5] The judge=s actions were well within the boundaries of his role in conducting the trial. *See Liteky*, 510 U.S. at 556 (judicial rulings, routine trial administration efforts, and ordinary admonishments to counsel and witnesses are inadequate grounds for disqualification); *see also Secretary of Labor on behalf of Clarke*, 7 FMSHRC at 993 (July 1985) (A[a]mong a judge=s specific obligations. . . is a duty to admonish counsel, when necessary@). In particular, we note that a judge has wide discretion to interject questions in order to clarify testimony. *See Deary v. City of Gloucester*, 9 F.3d 191, 194-95 (1st Cir.1993) (Amere active participation by the judge does not create prejudice@); *see also United States v. Webb*, 83 F.3d 913, 917 (7th Cir. 1996) (a judge is not prohibited from asking questions to clarify an important issue in the case); *United States v. Olmstead*, 832 F.2d 642, 648 (1st Cir.1987) (comments and questions remedied leading questions, clarified lines of inquiry, or developed witness= answers and were within court=s discretion), *cert. denied,* 486 U.S. 1009 (1988). Further, a judge=s actions at trial in seeking to avoid repetition in examining witnesses and limiting use of hypothetical questions are proper. *See Desjardins v. Van Buren Community Hospital*, 969 F.2d 1280, 1282 (1st Cir. 1992) (judge=s request that counsel not be repetitive and follow proper procedures in asking questions not an abuse of discretion). Finally, the judge=s placing on the record his concern about counsel=s throwing his glasses during an off-the-record discussion was an appropriate response to counsel=s conduct. *See Arthur Pierson & Co. v. Provimi Veal Corp.*, 887 F.2d 837, 839 (7th Cir. 1989) (quoting *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 576 n.13 (7th Cir. 1989)) (A[f]riction between court and counsel does not constitute bias@). In sum, none of the judge=s actions cited in Medusa=s brief, either individually or cumulatively, indicate that the judge harbored inappropriate bias towards counsel that is grounds for recusal in this case.

[5] In *Rock of Ages*, 20 FMSHRC ___, Nos. YORK 94-76-RM through 94-83-RM (February 24, 1998), the Commission reviewed the identical judicial conduct at issue in this case. We concluded that there was no basis for reversing the judge based on his conduct of the trial.

We further reject Medusa=s argument that the Commission must reassign the case in order to avoid the appearance of bias. M. Br. at 1; M. Reply Br. at 4-5; Oral Arg. Tr. at 30. This record does not indicate an appearance of bias. Even if it were present, appearance of bias is an insufficient ground upon which to order recusal when the allegation of bias is based on prior judicial proceedings (as opposed to extrajudicial conduct). *See Liteky*, 510 U.S. at 552-53 & n.2, 556; *Baldwin Hardware Corp. v. Franksu Enterprise Corp.*, 78 F.3d 550, 557-58 (Fed. Cir. 1996). *Cf. Nichols v. Alley*, 71 F.3d 347, 350-52 (10th Cir. 1995) (based on objective considerations, a reasonable person would have reason to question judge=s impartiality to preside over trial of Oklahoma City bombing conspirator because of extrajudicial considerations, including damage to judge=s chambers and courthouse and injury to his staff from the bombing).[6] We reject Medusa=s apparent theory that a mere allegation of bias in one case may serve as grounds for recusal of that judge (and reassignment) in all subsequent cases involving the same party or counsel.

III.

Conclusion

For the foregoing reasons, we affirm the judge=s order denying Medusa=s motion for recusal.[7]

Mary Lu Jordan, Chairman

[6] *UMWA on behalf of Rowe v. Peabody Coal Co.*, 7 FMSHRC 1136 (August 1985), is readily distinguishable. That decision, which addresses disciplinary sanctions of a judge, refers to a prior reassignment order of the judge in the proceeding that was issued Ato avoid either the appearance or existence of judicial bias.@ *Id.* at 1138. However, the judge=s conduct in that proceeding involved extrajudicial incidents, including several ex parte contacts with representatives of one of the parties. *Id.* 1140-44.

[7] As noted above, Medusa moved to strike a portion of the Secretary=s brief to the Commission which stated that the assertion that the judge is biased must be evaluated Ain light of the fact that Mr. Chajet has made a practice of making meritless accusations of impropriety against judges, other counsel, and parties in litigation.@ S. Br. at 10-11, *cited in* M. Reply Br. at 5-10. We vote to grant the motion to strike and, accordingly, the motion is granted. The referenced portions of the Secretary=s brief have not been relied on in our decision in this matter.

James C. Riley, Commissioner

_____

Theodore F. Verheggen, Commissioner

Commissioner Marks, concurring in part and dissenting in part:

I concur in the result reached by my colleagues in affirming Administrative Law Judge Feldman=s denial of Medusa=s motion for recusal. However, I find inexplicable the majority=s refusal to use Attorney Chajet=s name throughout most of their opinion. There were two counsels representing Medusa in this case, Paul Wilson and Henry Chajet, both of the Patton Boggs law firm. According to the Secretary of Labor, Mr. Wilson was the lead counsel. The recusal motion was made as a result of matters that affected Mr. Chajet, not Mr. Wilson. It was Mr. Chajet who claimed he had experienced the judge=s Apersonal bias.@ Maj. slip op. at 3, line 22. It was Mr. Chajet who claimed that the judge Ainterject[ed] repeatedly@ during his cross-examination, and that he was encouraged to withdraw objections to the way the hearing was being conducted (maj. slip op. at 3, lines 29, 32-33), and it was Mr. Chajet who claimed that the judge=s displeasure assertedly increased with the filing of the brief with the Commission in the *Rock of Ages* appeal. Maj. slip op. at 4, line 1. It was Mr. Chajet who objected to the judge=s conduct of the *Rock of Ages* hearing (Maj. slip op. at 4, line 3) and to the judge=s admonishment of him for throwing off his glasses during an off-the-record conference. Maj. slip op. at 4, lines 3-5. It was Mr. Chajet=s affidavit that swore that AJudge Jerold Feldman bears personal bias against me.@ Maj. slip op. at 4, lines 8-9. Again, it was Mr. Chajet who claimed that the judge cut off his use of hypothetical questions. Maj. slip op. at 7, line 1. And it was Mr. Chajet that the judge admonished for lack of decorum. Maj. slip op. at 7, lines 2-3. Finally, it was Mr. Chajet who threw his glasses during an off-the-record discussion. Maj. slip op. at 7, lines 21-22.

The opinion sustaining the judge=s order denying Medusa=s motion for recusal should have specifically indicated that Mr. Chajet, and not Mr. Wilson, was the recipient of the trial judge=s actions.

I dissent from the majority=s granting Medusa=s motion to strike, believing that in light of the disposition of this case there is no need to reach that matter. I must say, however, as I did at the oral argument in this case **C** that for the Secretary to state in her brief that Mr. Chajet has made a practice of making meritless accusations of impropriety against judges, other counsel, and parties in litigation without the slightest bit of evidence being presented to the Commission to sustain those charges (even though the Secretary=s counsel was again given the chance to do so at the oral argument) is in my opinion conduct unbecoming that which one expects from the Secretary=s legal staff.

Marc Lincoln Marks, Commissioner

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