

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 17, 1996

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
On behalf of LONNIE BOWLING,	:	
EVERETT DARRELL BALL,	:	Docket Nos. KENT 95-604-D
WALTER JACKSON, AND	:	KENT 95-605-D
DAVID FAGAN	:	KENT 95-613-D
	:	KENT 95-615-D
v.	:	
	:	
MOUNTAIN TOP TRUCKING COMPANY,	:	
MAYES TRUCKING COMPANY, INC.,	:	
ELMO MAYES, WILLIAM DAVID RILEY,	:	
AND ANTHONY CURTIS MAYES	:	

BEFORE: Jordan, Chairman; Doyle, Holen, Marks and Riley, Commissioners

ORDER

BY THE COMMISSION:

By order dated April 8, 1996, Administrative Law Judge Jerold Feldman certified for interlocutory review by the Commission, under Commission Rule 76(a)(1)(i), 29 C.F.R. § 2700.76(a)(1)(i) (1995), his denial of the entry of appearance by private counsel for the individual complainants in the instant proceeding. We conclude that the judge's ruling involves a controlling issue of law and that immediate review may materially advance the final disposition of the proceeding. Thus, we hereby grant review, pursuant to Commission Rule 76(a)(2), 29 C.F.R. § 2700.76(a)(2). We waive the filing of briefs from the parties otherwise required by the Commission's rules in interlocutory review proceedings. *See* Commission Rule 76(e), 29 C.F.R. § 2700.76(c).

The judge's Order Denying Notice of Appearance, also dated April 8, 1996, denied the entry of appearance by private counsel representing individual miner complainants in a discrimination proceeding brought by the Secretary of Labor, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (1994). Upon consideration of the judge's order, we reverse. The right of a miner complainant to participate in a discrimination proceeding brought by the Secretary is unequivocal. Section 105(c)(2) provides that a complaining miner may present evidence. Commission Rule 4(a) reiterates that statutory right and accords the complaining miner party status in a section 105(c)(2) proceeding. 29 C.F.R. § 2700.4(a). Commission Rule 3(c) further provides for entry of appearance by the representative of a party. 29 C.F.R. § 2700.3(c).

Moreover, the Commission and a United States court of appeals have approved the use of private attorneys in section 105(c)(2) actions. *Eastern Assoc. Coal v. FMSHRC*, 813 F.2d 639, 643 (4th Cir. 1987) ("The complainant has . . . chosen to retain private counsel."), *aff'g Secretary on behalf of Ribel v. Eastern Assoc. Coal Corp.*, 7 FMSHRC 2015, 2021 (December 1985) (miner retained private counsel); *Secretary on behalf of Gilbert v. Sandy Fork Mining Co.*, 9 FMSHRC 1327, 1339 n.6 (August 1987) ("Individual complainants remain free to retain private counsel at any time.").

Accordingly, the judge's denial of the entry of appearance by the attorney representing the individual miners is reversed and the judge shall accept his entry of appearance.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner