

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 21, 1995

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-1274-D
ON BEHALF OF CHARLES H.	:	
DIXON, et al.	:	
	:	
	:	
vs.	:	
	:	
	:	
PONTIKI COAL CORPORATION	:	

ORDER

On March 8, 1995, the Secretary of Labor filed with the Commission a petition for discretionary review seeking review of Administrative Law Judge Gary Melick's February 6, 1995, Order Granting Partial Dismissal.

The petition seeks review of the judge's dismissal, for lack of jurisdiction, of the Secretary's discrimination complaint under section 105(c)(2) of the Mine Act as it pertains to the 17 individuals named in the complaint other than Charles H. Dixon. Order at 4, 6. The judge based his dismissal on the fact that only Dixon had filed a complaint with the Secretary. *Id.* at 4. The Secretary also seeks review of the judge's limitations of the complaint regarding Dixon to matters contained in his complaint to the Secretary and to acts occurring on or after April 15, 1994. Pet. at 1-2.

The Commission's Procedural Rule 70, which implements section 113(d)(2)(A) of the Mine Act, 30 U.S.C. ' 823(d)(2)(A), provides: "Any person adversely affected or aggrieved by a judge's decision . . . may file . . . a petition for discretionary review . . ." 29 C.F.R. ' 2700.70. The Commission has held that a judge's decision is not subject to review under section 113 of the Mine Act and the Commission's rules unless it "*finally* disposes of the proceedings." *Council of S. Mountains v. Martin County Coal Corp.*, 2 FMSHRC 3216, 3216-17 (November 1980) (emphasis in original). Where a judge has disposed of less than all claims in multiple-party proceedings, the Commission has applied Rule 54(b) of the Federal Rules of Civil Procedure in

determining whether the decision is final.<sup>1</sup> *Emery Mining Corp.*, 11 FMSHRC 1, 2 (January 1989).

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<sup>1</sup> Rule 1(b) of the Commission's Procedural Rules provides that the Federal Rules of Civil Procedure shall apply "so far as practicable" in the absence of applicable Commission rules. 29 C.F.R. ' 2700.1(b).

Rule 54(b) states in part:

[W]hen multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates . . . the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating . . . the rights and liabilities of all the parties.

Fed. R. Civ. P. 54(b).

We conclude that the order is not final. The judge did not expressly direct that his dismissal of the complaint as to the other 17 individuals be entered as a final decision, nor did he find, pursuant to Rule 54(b), that there is no just reason for delay. Further, the judge subsequently modified the order and characterized it as interlocutory. *See* Amended Order

Granting Partial Dismissal (May 9, 1995). Accordingly, we dismiss the Secretary's petition for discretionary review as premature. *See, e.g., McCoy v. Crescent Coal Co.*, 3 FMSHRC 2475 (November 1981).

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Mary Lu Jordan, Chairman

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Joyce A. Doyle, Commissioner

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Arlene Holen, Commissioner

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Marc Lincoln Marks, Commissioner