

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

August 31, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2007-321-M
Petitioner	:	A. C. No. 04-01299-111706 G861
v.	:	
	:	
MORNING GLORY GOLD MINES,	:	Sixteen to One Mine
Respondent	:	

ORDER DENYING MOTION FOR RECUSAL

_____ On August 29, 2007, the Respondent, Morning Glory Gold Mines, by its owner, Michael M. Miller, filed an affidavit requesting that the undersigned Administrative Law Judge withdraw from the instant proceeding on the grounds that “throughout his proceeding with the company [in the case of Docket No. WEST 2002-226-M, Judge Melick] appeared to have a bias towards the MSHA agency and failed to act as an impartial participant”. In his affidavit Mr. Miller cites the unpublished memorandum decision of the United States Court of Appeals for the 9th Circuit (No. 04-71301) filed March 30, 2006, in which the court reversed the decision of the undersigned judge in the case of *Secretary v. Original Sixteen to One Mine, Inc.*, 26 FMSHRC 21 (January 2004) (ALJ) finding that a lead miner was an agent of the mine operator for purposes of imputing negligence to the mine operator. While the judge’s findings of violations in the case were not disturbed by the Circuit Court, the Court nevertheless vacated the assessment of penalties against the operator surmising that any penalty assessment would be “arbitrary and capricious”. It is noted that the Commission had previously denied review of the judge’s decision.

Other than citing the reversal of the judge’s findings that the lead miner was an agent of the operator for purposes of imputing negligence to the operator and citing Mr. Miller’s opening statement as evidence, the Respondent alleges no specific example of bias. Indeed, the undersigned judge has subsequently presided over hearings involving two other cases of the Original Sixteen to One Mine and mine owner Michael Miller (Docket Nos. WEST 2004-330-M and WEST 2004-472-M) and issued a decision in those cases on August 19, 2005. Review was denied by the Commission on September 29, 2005. In his recent affidavit Mr. Miller does not allege that the undersigned Judge showed “bias towards the MSHA agency” or “failed to act as an impartial participant” in these cases.

Commission Rule 81, 29 C.F.R. § 2700.81 permits a party to request a judge to withdraw on the grounds of personal bias or other disqualification. Commission Rule 81(b) requires, however, that a party make such a request by “filing an affidavit setting forth in detail the matters alleged to constitute personal bias or other grounds for disqualification.” The Respondent herein has failed to set forth “in detail the matters alleged to constitute personal bias or other grounds for disqualification”. In the case of *Secretary of Labor v. Medusa Cement Company* 20 FMSHRC 144, 148-149 (February 1998) the Commission discussed when recusal may be appropriate. In that case the Commission quoted from the Supreme Court’s decision in *Liteky v. United States*, 510 U.S. 540 (1994) where the court distinguished between a judges’ opinions derived from “extra judicial source[s]” and those derived from a prior judicial proceeding. *Id.* at 550-551. The Commission noted that the court held therein as follows:

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 source of...current...or...prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make a fair judgement impossible.

In his affidavit filed herein, the Respondent’s owner cites only the decision of the 9th Circuit Court of Appeals reversing the undersigned judge’s findings that the negligence of a lead miner should be imputed to the mine operator and the judge’s use of Mr. Miller’s admissions in his opening statement as a basis for finding “bias”. Since these are not appropriate grounds for recusal, the Respondent’s motion herein must be denied.

While I have denied the Motion for Recusal I note that the undersigned judge appears to have been disproportionately assigned cases involving the Sixteen to One Mine over the past several years. Under Commission Rule 50, 29 C.F.R. § 2700.50 cases are assigned to judges “in rotation as far as practicable”. While there is no reason to believe that the instant case was not assigned in accordance with that rule, there may be such an appearance. Accordingly, I am referring the instant case to the Chief Judge for reassignment.

Gary Melick
Administrative Law Judge
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