

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

June 16, 2023

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2023-0141
ADMINISTRATION (MSHA)	:	A.C. No. 46-09569-568207
	:	
v.	:	
	:	
CONSOL MINING COMPANY LLC	:	
	:	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

ORDER

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On June 9, 2023, the Secretary of Labor’s Mine Safety and Health Administration (“MSHA”) filed a Petition for Discretionary Review seeking review of the Judge’s May 11, 2023 Order denying the parties’ motion to approve settlement of the captioned matter. The Judge stated that “[t]he parties should anticipate that the matters addressed by the motion will be resolved at hearing” Order at 2.


Although the Secretary titled her filing as a Petition for Discretionary Review, we conclude that her filing is more aptly described as a petition for interlocutory review. That is because the Judge’s Order is not a final decision and thus the Commission is unable to consider a petition for discretionary review filed pursuant to section 113(d) of the Mine Act, 30 U.S.C. § 823(d) and Commission Procedural Rule 70.¹ See *Sec’y of Labor on behalf of Reuben Shemwell*, 35 FMSHRC 2056, 2057 (July 2013) (“[s]ection 113(d) of the Mine Act, 30 U.S.C. § 823(d), only allows for review of final decisions.”).

However, pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76, the Commission may review a Judge’s ruling, prior to the Judge’s final decision in the case, if certain conditions are met. According to Rule 76(a)(1), the Judge must certify that his interlocutory ruling involves a controlling question of law and that immediate review will

¹ Commission Procedural Rule 70 implements section 113(d) of the Mine Act and sets forth the provisions under which a party can seek relief before the Commission from a final order of an administrative law judge. 29 C.F.R. § 2700.70.

materially advance the final disposition of the proceeding. Or, in the alternative, the Judge must deny a party's motion for certification of the interlocutory ruling to the Commission, and then the party must file with the Commission a petition for interlocutory review within 30 days of the Judge's denial of such motion. In the present case, the Judge has neither certified the case for interlocutory review, nor has the Secretary initially sought such certification by first filing a motion with the Judge.

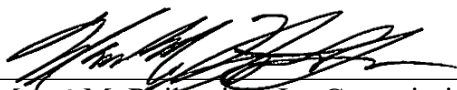
Accordingly, because the Secretary has filed for review of a Judge's interlocutory ruling with the Commission, prior to first filing a motion for certification with the Judge, we DENY the petition for interlocutory review without prejudice.²



Mary Lu Jordan, Chair



William I. Althen, Commissioner



Marcó M. Rajkovich, Jr., Commissioner



Timothy J. Baker, Commissioner

² This case consists of a total of six citations. Currently pending before the Judge is a motion to bifurcate this matter into two cases: one case concerning the four citations which are the subject of the denied motion to approve settlement and the second case consisting of the two additional citations that are scheduled for hearing on July 25, 2023. Bifurcating this matter into multiple cases, with discrete docket numbers, would both facilitate potential Commission interlocutory review and prevent any unintentional delays leading up to the scheduled hearing on the unresolved citations.

Distribution:

Emily Toler Scott,
Counsel for Appellate Litigation
U.S. Department of Labor
Office of the Solicitor
Division of Mine Safety & Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

Robert S. Wilson
Office of the Solicitor
U.S. Department of Labor, MSHA
201 12th Street, Suite 401
Arlington, VA 22202
wilson.robert.s@dol.gov

D. Cass Trent, CLR
U.S. Department of Labor, MSHA
4499 Appalachian Hwy
Pineville, WV 24874
trent.david@dol.gov

Jim McHugh,
Hardy Pence LLC,
10 Hale Street, 4th Floor
P.O. Box 2548
Charleston, WV 25329
jmchugh@hardypence.com

Craig Aaron,
CONSOL Energy Inc.,
275 Technology Drive, Suite 101
Canonsburg, PA 15317
craigaaron@consolenergy.com

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

Administrative Law Judge Michael G. Young,
Federal Mine Safety and Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Ave, NW, Suite 520N
Washington, DC 20004
myoung@fmshrc.gov