



KENDALL NUTUMYA, *ET AL.*

180 IBLA 371

Decided February 16, 2011



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

KENDALL NUTUMYA, *ET AL.*

IBLA 2010-173

Decided February 16, 2011

Appeal from an interlocutory order of Administrative Law Judge Robert G. Holt allowing additional time for Nutumya to file an amended petition for attorney fees and for the Office of Surface Mining Reclamation and Enforcement to respond. DV-2009-4-PR/AF.

Dismissed.

1. Administrative Procedure: Generally--Interlocutory Appeals--Surface Mining Control and Reclamation Act of 1977: Hearings: Procedure

There shall be no interlocutory appeal from a ruling of an administrative law judge unless the appellant has sought or obtained certification of the ruling from the administrative law judge and permission is first obtained from the Board. An appeal of an interlocutory ruling by an administrative law judge will be dismissed absent compliance with this procedural requirement.

APPEARANCES: David L. Abney, Esq., Phoenix, Arizona; John S. Retrum, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Kendall Nutumya, *et al.* (Nutumya),¹ appeals from Administrative Law Judge (ALJ) Robert G. Holt's May 28, 2010, Order (Interlocutory Order), addressing Nutumya's petition for an award of attorney fees and related expenses under section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1275(e) (2006), and 43 C.F.R. §§ 4.1294(b), 4.1295(b). The Interlocutory Order, because of deficiencies in his initial fee petition, allowed Nutumya additional time to file an amended petition and permitted the Office of

¹ Kendall Nutumya is the named class representative of 40 Hopi Tribal members who reside in Arizona. For ease of reference, we refer to Nutumya in the singular.

Surface Mining Reclamation and Enforcement (OSM) the opportunity to respond to such amended petition. The Interlocutory Order also encouraged the parties to engage in alternative dispute resolution.² Nutumya then filed a notice of appeal (NOA) from the Interlocutory Order.

In this decision, we dismiss the appeal because Nutumya failed to follow the required procedures governing interlocutory appeals.

Background

In January 2009, Nutumya appealed an OSM decision granting Peabody's petition to revise and combine its two life-of-mine operation permits for the "Black Mesa Complex," a 62,930-acre surface mining facility in northern Arizona, into a single permit. Among other claims, Nutumya alleged that OSM violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4347 (2006), because, *inter alia*, the agency did not consider a reasonable range of alternatives to the amended proposed action. On January 5, 2010, ALJ Holt entered a summary decision in Nutumya's favor based solely on that petitioner's NEPA claims, dismissed all other claims as moot, and vacated OSM's decision. No party appealed the decision, which then became final for the Department.

Nutumya subsequently filed with ALJ Holt a petition for attorney fees.³ The petition included fees purportedly accrued by Nutumya's "Black Mesa litigation team," which included Nutumya's counsel, a paralegal, and two attorneys and 12 law students associated with the University of California, Los Angeles School of Law's Frank G. Wells Environmental Law Clinic. The petition used the amount of \$300 per hour for the attorneys' time, \$100 per hour for the paralegal's time, and \$25 per hour for the law students' time, generally based on hourly rates in the Phoenix and Los Angeles metropolitan areas. The petition requested fees amounting to a total of \$280,125.00. *See* Petition for Fees, Affidavit of David L. Abney, Esq., Tab 1 at ¶¶ 13 - 15.

² Also on May 28, 2010, ALJ Holt issued an order dismissing Peabody Western Coal Co. (Peabody) from the attorney fees proceeding. Nutumya did not appeal that order.

³ Section 525(e) of SMCRA permits a person who participated in "any administrative proceeding under this chapter" to collect "a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings." This section applies to SMCRA permit review proceedings. *See Natural Resources Defense Council, Inc., v. OSM*, 107 IBLA 339, 355-60 (1989).

In the Interlocutory Order, ALJ Holt acknowledged that OSM conceded that Nutumya is eligible and entitled to an award of attorney fees from OSM, but that OSM disputed the amount claimed. Interlocutory Order at 2. But, ALJ Holt found that Nutumya’s petition contained deficiencies. Specifically:

It includes hours claimed for work before OSM even issued the challenged decision, hours claimed for work on unsuccessful and unrelated claims, and hours claimed for unnecessary or duplicative work. But, the record does not now provide a convincing basis for distinguishing compensable work from non-compensable work.

Further, the rates of compensation should be in line with the rates prevailing in Salt Lake City, Utah, the community in which the proceedings took place. But neither party has provided evidence of what those rate[s] are. In addition a legal question exists about whether Nutumya may receive an award for work performed by the UCLA legal clinic under the SMCRA statute and regulations.

Id. at 11. ALJ Holt then allowed the parties to “provide additional argument and information,” authorizing Nutumya to file an amended petition and OSM to file an answer to the amended petition. He also encouraged the parties to seek settlement. *Id.* at 12.

Nutumya seeks review of the Interlocutory Order because, in his view, he is entitled to every dollar in the amount claimed in his initial petition. In fact, he disputes virtually everything in the Interlocutory Order except for the acknowledgment by OSM that he is eligible and entitled to attorney fees. However, we need not resolve this issue because Nutumya has not shown, let alone even mentioned, that he has met the requirements for filing an interlocutory appeal.

Analysis

Nutumya appears unfamiliar with our rules governing interlocutory appeals.⁴ There is no right to appeal an ALJ’s interlocutory ruling to this Board. The general rules provide that “[t]here shall be no interlocutory appeal from a ruling of an administrative law judge unless permission is first obtained from an Appeals Board.” 43 C.F.R. § 4.28.

⁴ In the NOA, Nutumya incorrectly references 43 C.F.R. §§ 4.411 and 4.1271 as the bases for this appeal to the Board. Those rules apply to ALJ rulings that “dispos[e] of a proceeding.” 43 C.F.R. § 4.1271(a). The Interlocutory Order clearly did not dispose of Nutumya’s fee petition.

[1] Interlocutory appeals in surface mining proceedings are governed by the regulations in 43 C.F.R. Subpart L—“Special Rules Applicable to Surface Coal Mining Hearings and Appeals.” Those regulations at 43 C.F.R. §§ 4.1124 and 4.1272 establish a definite procedure for challenging an interlocutory ruling by an administrative law judge in a surface mining proceeding. The first step in that procedure is filing a motion with the administrative law judge requesting that the ruling be certified to the Board. *See* 43 C.F.R. § 4.1124. The judge may only grant certification of “a ruling that does not finally dispose of the case if the ruling presents a controlling question of law and an immediate appeal would materially advance ultimate disposition by the judge.”⁵ *Id.*

When, under 43 C.F.R. § 4.1272(a), “a party has sought certification under § 4.1124, that party may petition the Board for permission to appeal from an interlocutory ruling.” In its discretion, the Board permits such an appeal “if the correctness of the ruling sought to be reviewed involves a controlling question of law the resolution of which will materially advance the final disposition of the case.” 43 C.F.R. § 4.1272(c); *see* 43 C.F.R. § 4.28. In considering whether such conditions are met, the Board has generally viewed interlocutory appeals with disfavor. *Yates Petroleum Corp.*, 136 IBLA 249, 250 (1996).

However, as 43 C.F.R. § 4.1272(a) makes clear, only compliance with 43 C.F.R. § 4.1124 allows a party to advance further, since only a party who has sought certification may petition⁶ the Board for permission to appeal from an interlocutory ruling. Instead of following this procedure after issuance of the Interlocutory Order, a considerable amount of excessive and unnecessary briefing ensued: Nutumya filed an NOA followed by a Statement of Reasons, followed by OSM’s Answer, followed by Nutumya’s further Reply. None of the briefing acknowledged Nutumya’s failure to first request certification from ALJ Holt.

Absent compliance with 43 C.F.R. § 4.1124, a party may not petition the Board for permission to appeal. For that reason, we must dismiss Nutumya’s appeal.

Even if Nutumya had properly sought certification, and we were to interpret Nutumya’s NOA as a petition for permission to appeal from the Interlocutory Order, we would deny it because an immediate appeal from the Interlocutory Order would not materially advance final disposition of the underlying fees petition.

⁵ The regulation also provides that an ALJ may certify such a ruling upon his own initiative.

⁶ The petition is limited to 10 pages, and if the Board grants the petition, it may either dispense with briefing or issue a briefing schedule. 43 C.F.R. § 4.1272(b), (d).

In this case, we do not see how a dispute about the quantum of legal fees satisfies the standards of 43 C.F.R. § 4.1272(c). Even assuming, *arguendo*, that ALJ Holt's ruling involves controlling questions of law,⁷ our resolution of those questions must virtually determine the outcome of the case or, at least expedite, simplify, or streamline further proceedings. See generally *United States v. Walter B. Freeman*, 174 IBLA 290, 294 (2008); see also *Curt L. Willsie*, 163 IBLA 291, 295 (2004); *Muskingum Mining Co. v. OSM*, 113 IBLA 352, 356 (1990); *United States v. United States Pumice Co.*, 37 IBLA 153, 156 (1978). Here, the Interlocutory Order makes only two specific rulings: (1) that legal work performed before OSM approved the revised permit is not compensable, and (2) that only legal work on successful claims and those claims sufficiently related to successful ones are compensable. Interlocutory Order at 5 - 6. Notwithstanding those rulings, the Interlocutory Order invites Nutumya and OSM to submit further argument and provide further information, an invitation, we understand, those parties have already accepted. As to the other issues discussed, ALJ Holt found insufficient evidence at that time to resolve them.

We see no benefit to our interfering in ALJ Holt's review of this matter at this time. His disposition of Nutumya's amended fees petition will result in a final decision appealable to the Board. See 43 C.F.R. § 4.1296. If Nutumya is dissatisfied with that final decision, his recourse lies in appealing that decision at that time, not in seeking unnecessary piecemeal review before us today.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, we dismiss the appeal.

/s/
H. Barry Holt
Chief Administrative Judge

I concur:

/s/
Bruce R. Harris
Deputy Chief Administrative Judge

⁷ We have held that a question of law is controlling when an ALJ makes a legal "determination . . . which, if left undisturbed, would necessarily result in a specific disposition" requiring later reversal of the ALJ's final judgment. *United States v. Kelly Armstrong*, 144 IBLA 331, 334 (1998). Nutumya makes no attempt to show this.