UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

Coleman Trucking, Inc., Docket No. 5-CAA-96-005

Respondent

ORDER DENYING MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

The U.S. Environmental Protection Agency ("EPA") has filed a motion requesting that a discovery order issued in this case be certified to the Environmental Appeals Board for interlocutory review. Coleman Trucking, Inc. ("Coleman"), opposes EPA's motion. For the reasons that follow, EPA's Motion for Certification of Interlocutory Appeal is found to be wholly without merit and, therefore, is *Denied.*

I. Background

This case arises under the Clean Air Act ("the Act"). 42 U.S.C. § 7401 *et seq.* EPA has filed an administrative complaint charging Coleman with two counts of violating Section 112 of the Act, 42 U.S.C. § 7412. These two counts involve the manner in which the respondent removed and disposed of alleged regulated asbestos-containing material. EPA seeks a civil penalty of $50,000 against Coleman, $25,000 for each count. 42 U.S.C. § 7413(d). Coleman filed an answer denying that it committed the violations. Coleman also requested a hearing.

Thereafter, a prehearing order was issued directing the parties, among other things, to list expected witnesses and exhibits. In response, EPA listed three witnesses. [1] The first witness listed was Mark Davis of the Akron Regional Air Quality Management District, Akron, Ohio. EPA explained that "Mr. Davis will testify regarding his inspection of the Heminger [*sic*] Elementary school, which supports the findings of violations in the Complaint." The second witness identified was Patrick Kilbane, a former employee of ESSTEK. EPA explained that "Mr. Kilbane will testify regarding his laboratory analysis of the samples collected by Mr. Davis and his finding that the samples contained asbestos."

The third witness listed by EPA was Jarrett Hightower, a former employee of Grandee & Associates, Inc. EPA explained that "Mr. Hightower will testify regarding his observations during Coleman's removal project at the Heminger [*sic*] Elementary School, which support the findings of violations in the Complaint."

After both parties had completed their prehearing exchange, Coleman initiated discovery. Coleman requested that EPA be ordered to make available for inspection and copying all documents in its possession, as well as in the possession of the Ohio Environmental Protection Agency, involving the Hemminger Elementary School and Coleman. In an order issued on February 12, 1997, this court denied Coleman's document production request on the grounds that it was overly broad and vague.

In addition to the production document request, however, Coleman also requested that it be allowed to depose Mark Davis, Patrick Kilbane, and Jarret Hightower. The respondent essentially argued that the narratives of the witnesses' expected testimony provided by EPA were inadequate. This court agreed with Coleman and in the February 12 order stated that the respondent was entitled to depose the three listed witnesses. Each of the depositions, however, was not to exceed three hours.

On February 21, 1997, EPA filed a motion seeking reconsideration of the February 12, 1997, discovery order. A conference call between the parties and the undersigned was held on March 18, 1997, and a number of motions were discussed, including EPA's motion for reconsideration of the discovery order. During this conference call, EPA expressed concern over the expense and general inconvenience of participating in the scheduled nine hours of deposition. EPA was informed by the court that while its motion for reconsideration of discovery would be denied, Jarret Hightower's deposition was being reduced from three hours to two hours. Coleman agreed to this reduction. The parties were advised that the Hightower deposition time was reduced in order that all three depositions could be completed on the same day. Thus, the expense and inconvenience associated with the depositions would be minimized.

An order was issued on March 19, 1997, setting forth the rulings made during the March 18 conference call. This order in part stated that EPA's Motion for Reconsideration of Discovery Order was denied. On March 24, 1997, EPA filed the present Motion for Certification of Interlocutory Appeal.

II. Discussion

A. EPA's Motion For Certification Of Interlocutory Appeal Is Untimely

Section 22.29 of the Consolidated Rules of Practice sets forth the procedure for seeking interlocutory appeal. 40 C.F.R. § 22.29. Section 22.29(a) provides that a request for certification of an order for interlocutory review shall be made within *six days* of notice of the ruling or service of the order sought reviewed. In that regard, Section 22.29(a) states:

... Requests for such certification shall be filed in writing within *six (6) days* of notice of the ruling or service of the order, and shall state briefly the grounds to be relied upon on appeal.

40 C.F.R. § 22.29(a). *Emphasis added.*

The language of Section 22.29(a) could not be more clear. If a party wants review of an interlocutory order, it has *six days* within which to request certification from the judge. Here, the order granting Coleman's request for depositions was issued on February 12, 1997. Accordingly, any motion by EPA for certification for interlocutory appeal of the February 12 discovery order had to have been filed no later than February 23, 1997. *See* Section 22.07(c) (adding 5 days where service is by mail), 40 C.F.R. § 22.07(c). EPA's present Motion for Certification of Interlocutory Appeal, however, was not filed until March 24, 1997. Clearly, EPA's motion for certification has been filed out of time. Section 22.29(a) permits no other reading. Nor does this section permit a reading that would allow a party to toll the six-day filing period merely by requesting reconsideration of the adverse ruling within that time.

Nonetheless, EPA attempts to side-step this timeliness issue by requesting certification of the court's "March 18, 1997, oral ruling denying Complainant's Motion for Reconsideration of Discovery Order." [2] To entertain EPA's interpretation of the six-day filing period for seeking certification for interlocutory appeal would render meaningless the provisions of Section 22.29(a). In that case, EPA, or any adversely affected respondent, could perpetuate its right to seek certification for interlocutory appeal simply by requesting reconsideration of the underlying substantive order long after the six-day filing period expired, but then seek certification within six days of the ruling or order disposing of the reconsideration request. Such an interpretation is unacceptable as it would subvert orderly procedure at the hearing level and invite chaos.

Accordingly, EPA's motion for certification of interlocutory appeal is denied as being untimely.

B. EPA's Motion For Certification For Interlocutory Appeal Does Not, In Any Event,Satisfy The Provisions Of Section 22.29(b)

Even if EPA's request for certification of interlocutory appeal of the February 12,1997, discovery order were timely, it would still be denied for lack of merit.

Section 22.29(b) of the Consolidated Rules, 40 C. F. R. § 22.29(b), is titled "Availability of interlocutory review". This section sets forth the criteria for determining whether appellate review of an interlocutory order is appropriate. It provides for a two-tier standard that must be satisfied before an interlocutory order may be certified for review.

The first tier is that "the order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion." The "important question of law", as framed by EPA, is as follows: "[W]hether a moving party seeking discovery must satisfy the requirements of 40 C.F.R. § 22.19 and whether the ALJ must make findings required by this Rule in order for the moving party to be entitled to additional discovery beyond what the Consolidated Rules provide for in the prehearing exchange." EPA Mem. at 2. For the reasons explained below, EPA's assertion that it has presented an important question of law, let alone one worthy of interlocutory review, is wrong.

The first point to be addressed is EPA's "ALJ findings" argument. It is helpful to reiterate at this time that the substantive discovery ruling in this case was issued on February 12, 1997. While EPA presently takes the convenient litigation position that specific Section 22.19 findings by the judge are a necessary component of any discovery order, and that anything less is reversible error, it is noteworthy that EPA failed even to advance this argument in its motion for reconsideration of the February 12 order.

In seeking reconsideration of the February 12 discovery order, EPA essentially argued that the ordered depositions were improper because the information sought by Coleman could be gleaned from the Agency's 48-exhibit prehearing exchange, and that defending the depositions would be burdensome to the Agency. [3] If the "ALJ findings" argument was not important enough to EPA for it to raise at the reconsideration stage, it follows that it also is not an important

question of law now. EPA certainly hasn't shown otherwise. Accordingly, EPA's argument in this regard fails.[4]

Next, EPA's argument that Coleman's alleged failure to satisfy the provisions of 40 C.F.R. § 22.19 presents an important question of law deserving of interlocutory review likewise fails. With respect to this point, it is worth mentioning that the depositions of Davis, Kilbane, and Hightower were not directed until after EPA failed to provide an adequate narrative of their expected testimony as directed by the court's November 8, 1996, Order Setting Prehearing Procedures. Requiring Coleman to proceed to hearing on the basis of the testimonial narratives supplied by EPA would have been patently unfair.

Given this background, EPA's argument that Coleman should have known the expected testimony of Davis, Kilbane, and Hightower simply by reviewing the Agency's 48 proposed exhibits is simply unpersuasive. Such an expectation is inconsistent with the views of the U.S. Supreme Court as expressed in *Hickman v. Taylor,* 329 U.S. 495 (1947), 91 L.Ed. 451. There, the Court stated:

Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

329 U.S. at 500. The Court reiterated this view in U.S. v. Procter & Gamble Company, 356 U.S. 677 (1958), 2 L.Ed.2d 1077, where it stated:

Modern instruments of discovery serve a useful purpose, as we noted in *Hickman v. Taylor*.... They together with pretrial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.

365 U.S. 682-683.

In sum, allowing Coleman under the facts of this case, the opportunity to depose EPA's three listed witnesses accords with fundamental notions of due process and is consistent with the Supreme Court's teachings in *Hickman v. Taylor* and *U.S. v. Procter & Gamble Company.*

C. Certification Of This Matter For Interlocutory Review Will Not Materially Advance The Ultimate Termination of This Proceeding

EPA submits that certifying the present discovery matter for interlocutory appeal will materially advance the ultimate termination of this case. EPA offers no sound argument, however, to support this assertion. *See* EPA Mem. at 6. Indeed, EPA's own actions support a contrary proposition. On April 1, 1997, EPA filed Complainant's Motion For Stay Of Deposition Discovery. In this motion, EPA essentially is asking that this proceeding be stayed until the Environmental Appeals Board has rendered a decision on appeal. [5] This can hardly be construed as supportive of EPA's argument that certifying this matter for interlocutory appeal will materially advance the disposition of this case. *See* Wright, Miller & Marcus *Federal Procedure and Practice,* Vol. 8, at 82-83 ("Ordinarily it is difficult to believe that a discovery order will present a controlling question of law or that an immediate appeal will materially advance the termination of the litigation.")

D. EPA Is Incorrect In Arguing That Review After A Decision Is Rendered By This Court Will Be Inadequate Or Ineffective

Finally, EPA submits that "once the depositions are taken, the damage to Complainant will be done. " EPA Mem. at 7. While EPA may consider the depositions to constitute "damage," Coleman appears to consider them as part and parcel of litigation. [6]

However characterized by the complainant, EPA has not shown that an adequate appeal of the February 12, 1997, discovery order is unobtainable after a decision is issued in this case. The fact that in the meantime EPA may incur some expense in the deposition process does not mean that there can be no effective appellate review. [7]

For example, while interlocutory review of discovery orders is not readily available in the federal courts *(see Church of Scientology of California v. U.S.,* 506 U.S.__ (1992), 121 L.Ed.2d 313, 322 n. 11*; McKesson Corp. V. Islamic Republic Of Iran,* 52 F.3d 346, 353 (D.C. Cir. 1995)(" ... discovery orders are not usually appealable until the litigation has finally ended")), appellate review is certainly available after the trial court has issued its decision. *See, e.g., Fennell v. First Step Designs, LTD.,* 83 F.3d 526, 532 (lst Cir. 1996)("Discovery matters are for the informed discretion of the district court, and the breadth of the discretion in managing pre-trial mechanics and discovery is very great."); *Hinkle v. City Of Clarksburg, W. VA.,* 81 F. 3d 416, 426 (4th

Cir. 1996)("District courts enjoy nearly unfettered discretion to control the timing and scope of discovery...."); and *Cruden v. Bank Of New York,* 957 F.2d 961 (2nd Cir. 1992)("A trial court enjoys wide discretion in its handling of pre-trial discovery, and its rulings with regard to discovery are reversed only upon a clear showing of an abuse of discretion.")

The above-cited cases are more than ample support for the proposition that discovery orders are appropriate for appellate review, if not for the proposition that trial judges have substantial discretion in ruling upon and in fashioning discovery orders.

ORDER

Accordingly, EPA's Motion for Certification of Interlocutory Appeal is *Denied* on the ground that it was not filed on time. Alternatively, even if this motion were considered timely, for the reasons mentioned above, it would be *Denied* in any event for lack of merit.

Carl C. Charneski

Administrative Law Judge

Issued: April 3, 1997

Washington, D.C.

[1] EPA also listed 48 exhibits.

[2] Interestingly, EPA's Motion for Reconsideration of Discovery Order cited no provision in the Consolidated Rules of Practice as authority for requesting reconsideration. Yet, EPA attempts to use the denial of its motion for reconsideration as a means of extending the six-day time deadline which does appear in the Consolidated Rules.

[3] As noted earlier, during a conference call between the parties and the court, a good faith effort was made to schedule the depositions so as to minimize any associated inconvenience and cost.

[4] Unlike Section 22.27(a), 40 C.F.R. § 22.27(a), where the judge is specifically required to include findings of fact in his initial decision, Section 22.19(f)

does *not* include a corresponding requirement that the judge set forth findings in ruling upon a discovery request.

[5] This is an interesting turn of events, inasmuch as EPA had vigorously (and successfully) opposed Coleman's earlier motion to stay these proceedings while the respondent sought an injunction against the Agency in the U.S. District Court for the Northern District of Ohio. *See* Order dated February 7, 1997.

[6] In that regard, the respondent submits: "Essentially, Complainant is stating that Coleman should pay the government $50,000 without any opportunity to depose Complainant's witnesses *because this would cause Complainant to incur standard and ordinary litigation expenses"* Coleman Resp. to EPA Mot. for Recon. at 2 *(emphasis added).*

[7] In fact, as Coleman has suggested to EPA during the March 18, 1997, conference call, inasmuch as two of the witnesses to be deposed are not government employees (the third being a state employee), EPA can conserve its resources by not participating in those depositions.

IN THE MATTER OF COLEMAN TRUCKING.INC., Respondent

Docket No. 5-CAA-96-005

Certificate of Service

I certify that the foregoing Order Denying Motion for Certification of Interlocutory Appeal, dated April 3 1997, was sent this day in the following manner to the below addressees.

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Dated: April 3, 1997