U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,	**ARB CASE NO. 2022-0027**
	ALJ CASE NOS. 2021-TNE-00027, 2021-TNE-00028
PROSECUTING PARTY,	**DATE: September 30, 2022**

v.

GOLDSTAR AMUSEMENTS, INC.,

and

LEE'S CONCESSIONS, INC.,

RESPONDENTS.

Appearances:

For the Prosecuting Party:
Seema Nanda, Esq., Jennifer S. Brand, Esq., Rachel Goldberg, Esq., Sara A. Conrath, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

For the Respondents:
R. Wayne Pierce, Esq.; *The Pierce Law Firm, LLC*; Annapolis, Maryland

Before Susan Harthill, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER DENYING INTERLOCUTORY APPEAL

HARTHILL, Chief Administrative Appeals Judge:

This case arises under the H-2B provisions of the Immigration and Nationality Act (INA).[1] On March 7, 2022, the Acting Administrator (Administrator) for the Department of Labor's Wage and Hour Division (WHD) filed a petition for interlocutory review requesting the Administrative Review Board (ARB or the Board) to vacate an Administrative Law Judge's (ALJ) Order issuing subpoenas for depositions of corporate representatives of the United States Citizen and Immigration Services (USCIS), an agency of the Department of Homeland Security (DHS) and the Office of Foreign Labor Certification (OFLC), an agency of the Department of Labor. For the following reasons, we deny the Administrator's petition for interlocutory review.

BACKGROUND

Goldstar Amusements, Inc. and Lee's Concessions, Inc. (Respondents) are H-2B employers that are mobile amusement operators.[2] In 2020, WHD determined Respondents violated the H-2B provisions of the INA during the 2016 and 2017 seasons for failure to pay the required wage, failure to pay transportation expenses, failure to accurately represent the employers' temporary need, preferential treatment of H-2B workers, and deficient pay records.[3] Respondents requested a hearing before an ALJ from the Office of Administrative Law Judges.[4]

On January 24, 2022, the ALJ issued an Order that gave Respondents the ability to ask for the issuance of deposition subpoenas and the Administrator an opportunity to object.[5] Respondents subsequently requested the ALJ to issue deposition subpoenas to corporate representatives of USCIS and OFLC.[6] The Administrator objected to the issuance of deposition subpoenas, contending that the ALJ did not have authority to issue deposition subpoenas and that the proposed depositions would not yield relevant testimony.[7]

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1 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(14). The implementing regulations are at 20 C.F.R. Part 655, Subpart A (2022).

2 Respondents' Opposed Motion for Summary Judgment at 2.

3 Administrator's Petition for Interlocutory Review at 3 (Admin. Pet.).

4 *Id.*

5 Order Granting Request for Issuance of Deposition Subpoenas at 1 (ALJ Subpoena Order).

6 *Id.*

7 *Id.*

On February 10, 2022, the ALJ granted Respondents' request for the issuance of deposition subpoenas.[8] The ALJ determined he had authority to issue deposition subpoenas pursuant to the Board's decision in *Childers v. Carolina Power & Light Co.*,[9] and in immigration cases pursuant to *Administrator, Wage & Hour Division v. Integrated Informatics*.[10] The ALJ further determined the depositions requested by Respondents were "reasonably calculated to lead to the discovery of admissible evidence" based on the detailed descriptions of the subject areas in the notices of deposition.[11]

On March 7, 2022, the Administrator filed a petition for interlocutory review with the Board.[12] On March 9, 2022, the ALJ issued an Order granting the Administrator's motion for stay pending the Board's review of the Administrator's petition for interlocutory appeal of the ALJ's Subpoena Order.[13] The ALJ noted the Administrator did not ask him to certify any question to the Board pursuant to the procedure in 28 U.S.C. § 1292(b).[14] On April 7, 2022, Respondents filed a response in opposition to the Administrator's petition for interlocutory review.[15] On April 29, the Administrator filed a reply brief.[16]

On June 13, 2022, the Board issued an Order Directing Supplemental Briefing.[17] Specifically, the Board requested the parties to submit additional briefs to address the questions of whether the ALJ's Subpoena Order is reviewable on appeal from a final judgment and whether OFLC is a party to this case.[18] On July

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8 *Id.*

9 *Childers*, ARB No. 1998-0077, ALJ No. 1997-ERA-00032 (ARB Dec. 29, 2000). *See* ALJ Subpoena Order at 2.

10 *Integrated Informatics*, ARB No. 2008-0127, ALJ No. 2007-LCA-00026 (ARB Jan. 31, 2011). *See* ALJ Subpoena Order at 2.

11 ALJ Subpoena Order at 2. The ALJ issued detailed instructions for the depositions, including that each be limited to three hours, and issued a protective order for the transcripts of the depositions. *Id.* at 2-3.

12 Admin. Pet. at 1.

13 Order Granting Administrator's Motion for Stay (Mar. 9, 2022) (ALJ Stay Order).

14 *Id.* at 1.

15 Respondents' Opposition to Petition for Interlocutory Review (Resp. Opp.).

16 Admin. Reply Brief.

17 Order Directing Supplemental Briefing (ARB June 13, 2022).

18 *Id.* at 3-4.

26, 2022, the Administrator filed a supplemental brief.[19] Respondents filed a supplemental brief on August 11, 2022.[20]

JURISDICTION AND STANDARD OF REVIEW

The Board's delegated authority includes the consideration and disposition of interlocutory appeals "in exceptional circumstances, provided such review is not prohibited by statute."[21] Interlocutory appeals are generally disfavored given the strong policy against piecemeal appeals.[22] When a party seeks interlocutory review of an ALJ's non-final order, the Board has elected to look to the interlocutory review procedures used by federal courts, including providing for certification of issues involving a controlling question of law as set forth in 28 U.S.C. § 1292(b).[23]

DISCUSSION

1. The Issue Was Not Certified Pursuant to 28 U.S.C. § 1292(b)

The first step in the interlocutory appeal process is to request that the ALJ certify the interlocutory issue for appellate review as provided in 28 U.S.C. § 1292(b).[24] However, the Acting Administrator did not request the ALJ to certify this issue for appellate review.[25]

2. The ALJ's Subpoena Order Does Not Satisfy the Collateral Order Exception

When an ALJ has not certified an order for interlocutory review pursuant to 28 U.S.C. § 1292(b), the Board may still consider reviewing an interlocutory order

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19 Admin. Supplemental Brief (Admin. Supp. Br.).

20 Respondents' Supplemental Brief (Resp. Supp. Br.). Following supplemental briefing by the parties, we conclude that we do not need to resolve the question of whether OFLC is a party to this case because OFLC's status as a party or non-party witness does not alter our analysis and determination that interlocutory review is not appropriate in this case.

21 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

22 *Gunther v. Deltek, Inc.*, ARB Nos. 2012-0097, -0099, ALJ No. 2010-SOX-00049, slip op. at 2 (ARB Sept. 11, 2012) (citing *Carter v. B & W Nuclear Techs., Inc.*, ALJ No. 1994-ERA-00013 (Sec'y Sept. 28, 1994)).

23 *Powers v. Pinnacle Airlines, Inc.*, ARB No. 2005-0138, ALJ No. 2005-SOX-00065, slip op. at 5-6 (ARB Oct. 31, 2005).

24 *Kim v. SK Hynix Memory Sols.*, ARB No. 2020-0020, ALJ No. 2019-SOX-00012, slip op. at 4 (ARB Jan. 28, 2020) (citation omitted).

25 ALJ Stay Order at 1.

that meets the "collateral order" exception, which applies if the appealed decision belongs to that "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[26]

To fall within the narrow "collateral order" exception to the traditional finality rule, the Acting Administrator must establish that the order being appealed: (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) would be effectively unreviewable on appeal from a final judgment.[27] This exception is "strictly construe[d]" to avoid "unnecessarily protracte[d] litigation."[28] If the ALJ's Order "fails to satisfy any one of these requirements, it is not appealable under the collateral-order exception to § 1291."[29]

A. The ALJ's Subpoena Order Conclusively Determines the Disputed Question

The Administrator contends that the ALJ's Subpoena Order conclusively determines that the ALJ has the authority to issue administrative subpoenas under the H-2B provisions of the INA.[30] Respondents counter that there are still several events that must occur before the Subpoena Order is conclusively determined, such as serving the subpoenas, witnesses choosing whether to comply, and potentially an enforcement action in federal court.[31]

We agree with the Administrator that the ALJ's Subpoena Order conclusively determines the disputed question of whether the ALJ has the authority to issue administrative subpoenas under the H-2B provisions of the INA.[32] The post-order events identified by Respondents do not change the fact that the ALJ's Subpoena Order itself decided the matter presented for review—whether the ALJ has

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26 *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

27 *Johnson v. Siemens Building Tech., Inc.*, ARB No. 2007-0010, ALJ No. 2005-SOX-00015, slip op. at 5 (ARB Jan. 19, 2007) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

28 *Id.*

29 *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988); *Kossen v. Empire Airlines*, ARB No. 2021-0017, ALJ No. 2019-AIR-00022, slip op. at 2 (ARB Feb. 25, 2021) (Order Denying Interlocutory Appeal).

30 Admin. Pet. at 7.

31 Resp. Opp. at 7-8.

32 *Id.* We are not taking a position in this Order on whether the ALJ was correct in determining the Board's decisions in *Childers* and *Integrated Informatics* demonstrate that ALJs have the authority to issue subpoenas in H-2B enforcement cases.

authority to issue the subpoena to a third party in H-2B enforcement cases.[33] Indeed, these post-order events will only occur as a direct consequence of the ALJ's conclusive Subpoena Order.

B. *The ALJ's Subpoena Order Resolves an Important Issue Completely Separate from the Merits of the Action*

We also agree with the Administrator that the ALJ's Subpoena Order resolves an important issue completely separate from the merits of the action. The issue is important because, while discovery orders are generally not considered to be appealable collateral orders, the ALJ's Subpoena Order in the instant case goes beyond a run-of-the-mill discovery dispute and addresses the ALJ's authority to issue subpoenas.[34] Specifically, the ALJ here analyzed ARB precedent and determined that he had the *authority* to issue subpoenas to third parties in H-2B enforcement cases.[35] This issue of authority to issue subpoenas is completely separate from the merits of the H-2B violations that are the core of this case – it "is not an ingredient of the cause of action and does not require consideration with it."[36]

C. *The ALJ's Subpoena Order is Not Effectively Unreviewable on Appeal from a Final Judgment*

The Administrator contends that the ALJ's Subpoena Order is effectively unreviewable on appeal from a final judgment for several reasons. First, the

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[33] *See, e.g.*, *United States v. Under Seal*, 853 F.3d 706, 720 (4th Cir. 2017) ("This most basic element is sometimes presumed satisfied so long as the district court has decided the matter presented on appeal." (internal citations and quotations omitted)).

[34] *See Heckman v. M3 Transport LLC*, ARB No. 2016-0083, ALJ No. 2012-STA-00059, slip op. at 3-4 (ARB Nov. 10, 2016) (ALJ's discovery orders are unsuitable for interlocutory review). We also note that, as the Administrator acknowledges, "the question of whether the depositions at issue would lead to relevant information is not 'completely separate from the merits of the action' as required by the collateral order exception." Admin. Pet. at 13, n.4. But relevancy objections are not the question at issue under review.

[35] ALJ Subpoena Order at 2 ("The ARB's decisions in *Childers* and *Integrated Informatics* demonstrate that I have the authority to issue the requested deposition subpoenas."). We also note the Administrator analogizes the issue of ALJ subpoena authority to sovereign immunity cases. Admin. Pet. at 8, citing to *Elliot v. Tenn. Valley Auth.*, ARB No, 2014-0020, ALJ No. 2013-ERA-00006 (ARB Sept. 17, 2014) (granting interlocutory appeal to determine whether the respondent had waived sovereign immunity); *Davis Mexia State Supported Living Ctr.*, ARB No. 2019-0077, ALJ No. 2019-FLS-00005 (ARB Jan. 21, 2021) (ALJ lacked authority because the respondent had not waived sovereign immunity). We do not need to address this comparison because we find the issue of ALJ subpoena authority is sufficiently important and distinct from the merits of the H-2B enforcement action.

[36] *Cohen,* 337 U. S. at 546-47.

Administrator contends that the ALJ's subpoenas cannot be reviewed on appeal because the depositions will have already been conducted by then.[37] Next, the Administrator contends that the subpoenas cannot be reviewed on appeal because the information gained is not likely to be relevant to a final judgment.[38] The Administrator also contends that, "to be reviewable on appeal, the evidence from the subpoenas would need to affect the outcome, otherwise the issue would be moot."[39] These arguments are not compelling because the ARB has previously decided subpoena authority issues after a hearing on the merits and a judgment has been issued by the ALJ as part of the review of a final agency decision.[40]

Moreover, courts have found there are other methods of review of subpoena orders than interlocutory appeal.[41] In *Mohawk Industries, Inc. v. Carpenter*, the Supreme Court identified potential avenues of immediate review, including petitioning a court for mandamus.[42] In the present case, for example, the regulations provide that a "party adversely affected" by an ALJ's subpoena order may go to district court.[43]

The Administrator has not shown why these other avenues are not available. The Administrator contends that these options are *inadequate* alternatives because it will inevitably delay in the resolution of administrative proceedings while not settling the question of the ALJ's subpoena authority with any finality.[44] The Administrator asserts that this delay will incentivize H-2B employers to strategically impede WHD's enforcement actions by seeking to subpoena non-

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37 Admin. Petition for Review at 9; Admin. Reply Br. at 3 n.2; Admin. Supp. Br. at 3-4, 9.

38 *Id.* We do not address whether depositions of OFLC representatives will contain relevant information for the same reasons that we do not address the issue of the ALJ's subpoena authority.

39 Admin. Reply. Br. at 6-8.

40 *See Childers*, ARB No. 1998-0077, slip op. at 2; *Integrated Informatics*, ARB No. 2008-0127, slip op. at 4.

41 *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009).

42 *Id.* at 110-11.

43 29 C.F.R. 18.56(e) ("When a person fails to obey a subpoena, the party adversely affected by the failure may, when authorized by statute or by law, apply to the appropriate district court to enforce the subpoena."). *See also Reich v. Nat'l Eng'g & Contracting Co.,* 13 F.3d 93, 95-96 (4th Cir. 1993) (explaining the process for enforcing administrative subpoenas in federal courts). The Administrator also had the option to seek certification of an interlocutory appeal from the ALJ, but chose not to do so in this case.

44 Admin. Supp. Br. at 4-5.

parties, whose only recourse will be to refuse to comply and challenge the ALJ's subpoena in federal district court.[45]

The Administrator asserts that delays resulting from denying interlocutory review will hinder WHD's enforcement of H-2B labor standards, which imperils a substantial public interest.[46] As the Court in *Mohawk* recognized, "the third *Cohen* question, whether a right is 'adequately vindicable' or 'effectively reviewable,' simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement."[47] In other words, a showing that a matter is effectively unreviewable requires demonstrating that delaying review "would imperil a substantial public interest" or "some particular value of a high order."[48]

In evaluating the third prong of the *Cohen* test, courts "do not engage in an 'individualized jurisdictional inquiry.' Rather, our focus is on 'the entire category to which a claim belongs.'"[49] As long as the claim can be addressed by other means, the matter is not appropriate for interlocutory appeal. The category to which attorney-client privilege at issue in *Mohawk* belongs is pre-trial discovery. Courts rarely grant interlocutory appeal of discovery orders.[50] The matter at issue in the Administrator's petition for interlocutory appeal also involves pre-hearing discovery as Respondents' request for subpoenas were for depositions.[51] Here, the ALJ reviewed both the Respondents' request and the Administrator's objections to that request before issuing the Subpoena Order. Appeals of court orders denying or

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45 *Id.* at 5-8

46 *Id.* at 10-11.

47 *Mohawk Indus.*, 558 U.S. at 107 (quoting *Digital Equipment Corp. v. Desktop Direct Inc.*, 511 U.S. 863, 878-79 (1994)).

48 *Id.* (quoting *Will v. Hallock*, 546 U.S. 345, 352-53 (2006)).

49 *Id.* (internal citations omitted).

50 *Id.* at 107 (in general, discovery disputes implicate no "substantial public interest" that overcomes finality principles); *see also Fernandez v. Navistar Int'l Corp.*, ARB No. 2010-00035, ALJ No. 2009-SOX-00043, slip op. at 4-5 (ARB Mar. 4, 2010) (adopting *Mohawk* test for Board proceedings); *see also* 15B C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3914.23, p. 123 (2d ed. 2022 update) ("Adhering to these concerns, courts routinely dismiss [immediate] appeals from orders granting discovery, denying discovery, granting protective orders, granting a protective order narrower than requested, denying protective orders, refusing to modify protective orders, or dealing with the procedures for conducting discovery.") (internal citations omitted).

51 ALJ Subpoena Order at 1-2; 29 C.F.R. § 18.56 (ALJ's procedures for subpoenas).

granting subpoenas for depositions fall under the general rule that pre-hearing discovery rules are not immediately appealable.[52]

The Administrator has failed to carry its burden to show that the ALJ's authority to issue administrative subpoenas is not reviewable on appeal from a final ALJ ruling or by means other than interlocutory appeal. The Administrator has also failed to show the ALJ's Subpoena Order is effectively unreviewable by demonstrating that delaying review would imperil a "substantial public interest" or "some particular value of a high order." In particular, the Administrator did not distinguish the ALJ's Subpoena Order from other pre-hearing discovery orders that are not final orders for purposes of interlocutory appeal.[53] Although we recognize the importance of mitigating against litigation delay in H-2B enforcement actions, even if the other methods of appeal caused delay in resolving administrative proceedings, that type of harm does not justify immediate appeal.[54] Discovery orders such as subpoenas are distinguishable from the class of cases where courts have granted immediate appeals.[55] Therefore, we find the Administrator has not shown why the ALJ's Subpoena Order compelling the depositions is effectively unreviewable without immediate appeal, and has not satisfied the third *Cohen* factor.

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[52] *In re AIR Crash at Belle Harbor, New York on Nov. 12, 2001*, 490 F.3d 99, 104 (2d Cir. 2007) ("Under traditional finality principles, a district court's decision to compel compliance with a subpoena or to deny a motion to quash a subpoena is generally not a 'final decision' and therefore is not immediately appealable.") (quoting *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 574 (2d Cir. 2005)).

[53] *Ott v. City of Milwaukee*, 682 F.3d 552, 555 (7th Cir. 2012) ("Just as a party asserting attorney-client privilege is compelled to use a method other than a collateral-order appeal if it wants to avoid turning over certain documents [*Mohawk*], so in our view must the state agencies resist their subpoena orders more definitively before this court may exercise jurisdiction. It might be enough that the state agencies may resist compliance and risk a contempt order, if they feel strongly that a prejudgment appeal is necessary."); *Robinson v. Tanner*, 798 F.2d 1378, 1380 (11th Cir. 1986) (orders compelling a party to submit to depositions are generally not immediately appealable).

[54] *Cf. U.S. v. Ryan*, 402 U.S. 530, 533 (1971) (the necessity for expedition justifies putting the party who seeks to resist the production of desired information to choose between complying with the order and resisting the order and facing the possibility of a contempt citation).

[55] *Robinson*, 798 F.2d at 1381 (listing common classes of immediately appealable discovery orders including certain litigation-ending sanctions and injunctions); *see also Will*, 546 U.S. at 352-53 (values so important as to merit collateral order review include "honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual" in criminal cases).

For these reasons, we conclude the ALJ's Subpoena Order is not appealable under the collateral order exception.

CONCLUSION[56]

Accordingly, we **DENY** the Administrator's Petition for Interlocutory Review.

SO ORDERED.

[redacted]
SUSAN HARTHILL
Chief Administrative Appeals Judge

[redacted]
THOMAS H. BURRELL
Administrative Appeals Judge

[redacted]
STEPHEN M. GODEK
Administrative Appeals Judge

[56] In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board).