BRB No. 04-0479 BLA

FRED B. WOOD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATEISSUED: 4/8/04
	)	
ELKAY MINING COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	ORDER

The Board acknowledges receipt of employer's Notice of Appeal and Motion to Stay the Proceedings. Employer's appeal is assigned the Board's docket number, BRB No. 04-479 BLA.

Employer, Elkay Mining Company, named as putative responsible operator in this claim, files a motion asking the Board to grant its interlocutory appeal. Employer has also filed a motion to stay the proceedings before the administrative law judge. Claimant responds asserting that the Board should dismiss employer's notice of appeal.

On August 29, 2002, claimant served employer with twenty-four interrogatories and requests for production of documents. Employer objected to interrogatories one through four on the grounds that the information was privileged and not subject to discovery. With respect to interrogatories five through twenty-four, employer disclosed the amount that it had paid certain physicians for their opinion in the present case, but otherwise objected asserting that the information sought was irrelevant, and that the discovery request was unreasonable and unduly burdensome.

On November 5, 2002, the administrative law judge granted claimant's motion to compel discovery and denied employer's request for a protective order. Employer then appealed to the Board which, in a decision dated November 12, 2003, vacated the order to compel discovery and remanded the case in order for the administrative law judge to fully explain the rationale for his findings and, if

necessary, to consider whether employer had demonstrated good cause for a protective order.

On remand, the administrative law judge found that: (1) the information sought by interrogatories one through four is relevant, not privileged, and not protected by the attorney work-product doctrine, (2) the information sought by interrogatories five through twenty-four is relevant, and discoverable, (3) employer had not demonstrated "good cause" for a protective order, (4) any reference to information sought would not be an improper disclosure of a record under the Privacy Act, and (5) a separate hearing on the discovery matters is not necessary. Thus, claimant's motion to compel discovery was again granted, and employer's request for a protective order, as well as his request for a separate hearing on the motion to compel, were denied. Employer now appeals this most recent order.

When this case was previously before the Board, we were presented with a notice of appeal filed by employer, as well as a petition to intervene filed by Dr. Fino. While we concluded that employer's interlocutory appeal did not satisfy the three-prong test used for determining whether an order that does not finally resolve litigation is nonetheless appealable, *see Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271 (1988), we nevertheless granted interlocutory review, finding that the appeal raised a compelling issue involving not only the rights of the parties, but also potentially impacting the rights of third parties. Thus, we held that interlocutory review was necessary to properly direct the course of the adjudicatory process. In addition, upon review of the appeal, we concluded that the administrative law judge's order to compel discovery was not in compliance with the Administrative Procedure Act, Section 557(c)(3)(A), as incorporated into the Act by 30 U.S.C. Section 932(a), by means of 33 U.S.C. Section 919(d) and 5 U.S.C. Section 554(c)(2).

However, while this case was on remand to the administrative law judge, Dr. Fino withdrew as intervenor. Moreover, on remand, the administrative law judge provided additional reasoning in support of to compel discovery.[1] Consequently, after review of the motion to grant this interlocutory appeal, as well as claimant's response thereto, employer's motion that the Board accept this interlocutory appeal is denied. Likewise, employer's motion to stay the proceedings before the administrative law judge is also denied. *See generally*, *Arjona v. Interport Maintenance*, 24 BRBS 222 (1991). Accordingly, employer's appeal is dismissed as interlocutory.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[1] We do not, at this time, rule on the merits of the reasoning provided by the administrative law judge.