United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. AUSTIN INDUSTRIAL SPECIALTY SERVICES, L.P., Respondent.	OSHRC Docket No. 11-2555

APPEARANCES:

Sheryl L. Vieyra, Senior Trial Attorney; Virginia E. Fritchey, Trial Attorney; Madeleine T. Le, Counsel for Occupational Safety and Health; James E. Culp, Regional Solicitor; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Dallas, TX and Washington, DC
For the Complainant

Steven R. McCown, Esq. and Russell Zimmerer, Esq.; Littler Mendelson, P.C., Dallas, TX
For the Respondent

ORDER

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

Before us is the Secretary's February 15, 2013 petition seeking interlocutory review of Administrative Law Judge Stephen J. Simko's denial of the Secretary's motion for a 30-day continuance of the hearing in this matter, which was scheduled to begin on February 20, 2013, in Houston, Texas. One week earlier, on February 13, 2013, Sheryl Vieyra, lead counsel for the Secretary, learned that she would require surgery during the week of February 18 and her physician prohibited her from traveling to the hearing as scheduled. Following surgery, she expected to be out of the office for at least six weeks. Ms. Vieyra notified Respondent's counsel that same day of the Secretary's intent to file a motion to continue the hearing. At that time, Respondent stated that it would oppose the motion.

The following morning, on February 14, 2013, the parties held a conference call with the

judge. In attendance on the conference call, in addition to the judge, were Stephen R. McCown and Russell Zimmerer, counsel for the Respondent; and Ms. Vieyra and co-counsel Virginia E. Fritchey for the Secretary. During the conference call, Ms. Vieyra explained that because of the large record in the case and the number of witnesses scheduled to testify, a continuance of 30 days would be required to bring another attorney up to speed to replace her in the case. After further discussion among the parties, including questioning by the judge and Respondent's counsel regarding the availability of other attorneys in the Dallas Regional Solicitor's office, the judge denied the Secretary's motion. He reasoned that an attorney working through the weekend and the President's Day holiday could be prepared to try the case as scheduled on February 20, 2013. An affidavit from Ms. Fritchey setting out the facts surrounding the Secretary's motion, including an account of this conference call, was included with the Secretary's petition for interlocutory review. The Respondent has filed an opposition to the petition.[1]

Under Commission Rule 73(a)(1), the Commission has the discretion to grant interlocutory review where "the review involves an important question of law or policy about which there is substantial ground for difference of opinion and . . . immediate review of the ruling may materially expedite the final disposition of the proceedings . . . ." 29 C.F.R.

[1] In its opposition filing, Respondent contends that specific representations made by Ms. Fritchey in her affidavit regarding conversations she had with Ms. Vieyra are "hearsay statements" under Federal Rule of Evidence 802. Respondent asks that these statements be "stricken" and not considered by the Commission. To the extent that Respondent's request is meant to be a motion, we note that Commission Rule 40(a) expressly prohibits including a motion in another document. 29 C.F.R. § 2200.40(a).

But putting aside this procedural misstep, we find the argument on which Respondent rests its purported motion lacking not only in decorum, but also in merit. Ms. Fritchey and Ms. Vieyra are the attorneys of record in this matter. Like Respondent's counsel, both are subject to rules of professional conduct as officers of the court. *See*, *e.g.*, Rule 104(a), 29 C.F.R. § 2200.104(a) (requiring all representatives appearing before Commission and judges to comply "with the letter and spirit of the Model Rules of Professional Conduct of the American Bar Association"). And Respondent has offered nothing to support its implication that the representations made by either attorney in this sworn affidavit should be doubted. Nor has Respondent indicated how else Ms. Vieyra's medical situation should have been conveyed to the Commission. In fact, a close reading of the affidavit reveals that most of what it describes took place during the conference call at which Respondent's counsel was a principal participant. At that time, counsel had the opportunity to confront Ms. Vieyra directly about her veracity before the judge. Finally, we direct Respondent's attention to Federal Rule of Evidence 807, which sets forth a "residual exception" to the hearsay rule. Based on our reading of the record, the criteria for meeting this exception have been amply satisfied here. Accordingly, we reject Respondent's request.

§ 2200.73(a)(1). If the petition is not granted by a majority of the Commissioners within 30 days, it is denied by operation of law. Commission Rule 73(b), 29 C.F.R. § 2200.73(b). For reasons set out separately below, the two Commission members do not agree on the disposition of the Secretary's petition. Chairman Rogers votes to not grant the petition. Commissioner Attwood votes to grant the petition or, at the very least, to stay the proceedings to afford more time for deliberation of its merit. Accordingly, the petition will be denied pursuant to Rule 73(b) as of March 18, 2013.

However, the Commission is in agreement on the following: Denial of the Secretary's petition should in no way be interpreted as an approval of the judge's ruling on the Secretary's motion for a continuance. *See Lewis County Dairy Corp*., 21 BNA OSHC 1070, 1071, 2005 CCH OSHD ¶ 32,859, p. 53,016-17 (No. 03-1533, 2005). Under the Commission's rules, the judge has a duty "to conduct a fair and impartial hearing, to assure that the facts are fully elicited, to adjudicate all issues and avoid delay." Commission Rule 67, 29 C.F.R. § 2200.67. The Commission strongly emphasizes that those same rules also impose an obligation on a judge to "adjourn the hearing as the needs of justice and good administration require[.]" Commission Rule 67(l), 29 CFR § 2200.67(l). Having considered the submitted affidavit and the serious nature of the representations made by the Secretary's counsel, as well as the Respondent's opposition filing, the Commission fails to see how the judge's denial of the Secretary's motion for a continuance reflects either "justice" or "good administration."

The separate opinions of both Commission members follow.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: March 1, 2013

Separate Opinion of Chairman Rogers

ROGERS, Chairman.

The Secretary has made no attempt to show that the relevant criteria for interlocutory review set forth under Rule 73(a)(1) have been met here. Upon review of the record, I find that the judge's denial of the motion for a continuance does not "involve[] an important question of law or policy about which there is substantial ground for difference of opinion." *See* Order of the Occupational Safety and Health Review Commission, *St. Marys Foundry, Inc.*, No. 07-0170 (consolidated) (Jan. 11, 2008) (attached) (finding denial of Respondent's motion for continuance of hearing did not warrant interlocutory review). Like my colleague, I am deeply troubled by the judge's ruling in light of the factual circumstances involved. But in my view, the "nature of the legal issues raised," including the potential for prejudice, which is not unusual in continuance disputes, simply does not meet the standard for interlocutory review. *Id.* Accordingly, I do not vote to grant the Secretary's petition.

Separate Opinion of Commissioner Attwood

ATTWOOD, Commissioner.

The Secretary requested a 30-day continuance upon learning on the eve of trial in a complex case that lead counsel required imminent surgery followed by weeks of recovery, and informed the judge that no other counsel was adequately prepared to step in on such short notice. Based on these asserted facts, it appears to me that the request for interlocutory review "involves an important question of law or policy about which there is substantial ground for difference of opinion" and, due to the timing and nature of counsel's incapacity combined with the legal complexity of the case, is distinguishable from prior cases, including *St. Marys Foundry, Inc.*, in which interlocutory review was not granted.[2]

Indeed, in overturning a judge's denial of a requested continuance, the Fifth Circuit—in which this case arises—noted that "[a]n exception . . . exists in certain cases when the illness of counsel is the ground for a continuance." *Smith-Weik Machinery Corp. v. Murdock Machine and Engineering Co.*, 423 F.2d 842, 844-45 (5th Cir. 1970). The court explained as follows:

> In Anglo-American law, with trials based on the adversary system as the best means of arriving at a just and legal result, the interests of justice . . . require[] that both parties be represented by able counsel well informed on the facts and the pertinent law. The illness of the defendant's principal attorney and local counsel's relative unfamiliarity with the case tipped the scales so heavily in favor of the plaintiff as to effectually deprive the defendant of its rightful day in court.

Based on the court's analysis and the potential for prejudice to the Secretary's case, I would find the circumstances here warrant interlocutory review.[3] This is especially so as any resulting prejudice to the Secretary may not be remediable after the fact by ordering a new trial, at which time essential witnesses may have become unavailable. Moreover, unlike a respondent for whom a dismissal may cure irreparable harm, the Secretary has no comparable remedy. I also

[2] In *St. Marys*, Respondent's Memorandum In Support of Petition for Interlocutory Review reveals that it retained new counsel who had prior conflicts with the impending hearing date but who nevertheless took the "case in the belief that his reasonable and complying request [for a continuance] would be granted." In contrast, counsel here became unexpectedly incapacitated, which was completely outside the Secretary's control.

[3] I also note that the asserted facts, if true, suggest that in denying the continuance, the judge improperly considered (1) matters not before him (settlement practices in other cases) and (2) purported personal knowledge of Solicitor's office attorney availability.

would not fault the Secretary, given the exigent circumstances, for omitting from his petition a formal "assert[ion]" that the interlocutory review criteria are met. *See* 29 C.F.R. § 2200.73(a)(1). Finally, by obviating the possibility of an unnecessary and costly appeal and re-trial, immediate review may well "materially expedite the final disposition of the proceedings." 29 C.F.R. § 2200.73(a)(1). Accordingly, I would grant the Secretary's petition.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. ST. MARYS FOUNDRY, INC., Respondent.	OSHRC Docket No. 07-0170 & 07-0171

APPEARANCES:

Patrick L. DePace, Trial Attorney; U.S. Department of Labor, Cleveland, OH

Michael Doyle, Counsel for Appellate Litigation; Charles S. James, Counsel for Appellate Litigation Joseph M. Woodward, Associate Solicitor; Jonathan L. Snare, Acting Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Gary W. Auman, Esq. and Douglas S. Jenks, Esq.; Dunlevey, Mahan & Furry LLP, Dayton, OH
For the Respondent

ORDER

Before: THOMPSON, Chairman; ROGERS, Commissioner.

BY THE COMMISSION:

On December 19, 2007, St. Marys Foundry, Inc. ("St. Marys") filed a petition with the Commission, seeking interlocutory review, under Commission Rule 73, 29 C.F.R. § 2200.73, of Administrative Law Judge Ken Welsch's order denying its motion for a continuance.[1] The Commission has discretion to grant interlocutory review where "the review involves an important question of law or policy about which there is substantial ground for difference of opinion and that immediate review of the ruling may materially expedite

[1] Pursuant to Commission Rule of Procedure 62(a), 29 C.F.R. § 2200.62(a), a hearing may be postponed by the judge "on his own initiative or for good cause shown upon the motion of a party." Commission Rule 62(b), 29 C.F.R. § 2200.62(b), specifically provides that "[a] motion for postponement grounded on conflicting engagements of counsel or employment of new counsel shall be filed . . . as soon as the conflict is learned of or the engagement occurs."

the final disposition of the proceedings." 29 C.F.R. § 2200.73(a)(1). St. Marys does not argue that its petition meets the requirements of Commission Rule 73, and given the nature of the legal issues raised, it is unlikely that any such argument would be successful. Accordingly, we deny St. Marys' petition for interlocutory review.

We note that St. Marys' counsel filed his motion for a continuance immediately after being retained and well before the seven days prior to the hearing as required by 29 C.F.R. § 2200.62(c). The motion referenced conflicting engagements that would likely hinder counsel's ability to fully participate in the previously scheduled nine-day hearing. Moreover, this case involves two docket numbers, a total of five citations alleging numerous willful, serious, and "other" violations of various general industry health and safety standards, 29 C.F.R. part 1910, and the General Duty Clause, 29 U.S.C. § 654(a)(1), and a total proposed penalty of $253,350. Given the conflicting engagements of St. Marys' newly retained counsel, as well as the potential length and complexity of this case and the unopposed nature of the motion, the judge may wish to reconsider whether "good cause" exists for a continuance. 29 C.F.R. § 2200.62(a).

SO ORDERED.

BY DIRECTION OF THE COMMISSION

/s/
Ray H. Darling, Jr.
Executive Secretary

Dated: January 11, 2008