

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 24, 2018

PEABODY TWENTYMILE MINING,
LLC,

Contestant,

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

PEABODY TWENTYMILE MINING,
LLC,
Respondent

CONTEST PROCEEDINGS

Docket No. WEST 2017-0247-R
Order No. 9025723;02/19/2017

Docket No. WEST 2017-0248-R
Citation No. 9025724;02/19/2017

Foidel Creek Mine
Mine ID 05-03836

CIVIL PENALTY PROCEEDING

Docket No. WEST 2017-553
A.C. No. 05-03836-439555

Foidel Creek Mine

ORDER GRANTING THE SECRETARY’S MOTION TO QUASH SUBPOENAS

Before: Judge Manning

These cases are before me upon notices of contest filed by Peabody Twentymile Mining, LLC, (“Twentymile”) and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Twentymile pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). On January 22, 2018 the Secretary moved to quash two subpoenas issued for the trial testimony of Tracy Santistevan and Robert Teeter which is scheduled for February 13, 2018. For reasons that follow the Secretary’s motion is granted.

On January 5, 2018 counsel for Twentymile requested two subpoenas for the trial testimony of Tracy Santistevan and Robert Teeter. Subsequently, on January 8, the court issued the requested subpoenas. On January 22 the Secretary emailed the court and moved to quash the subpoenas. The following day the court convened a conference call during which the parties presented their positions on the Secretary’s motion.

These cases involve one section 104(d)(1) citation and a corresponding imminent danger order. The citation alleges a violation of 30 C.F.R. § 75.1725(c) and states, in part, that the issuing inspector observed a “miner with a piece of roof bolter steel with a metal hook attached to the end removing wood and metal from the moving feeder conveyor.” (Citation No. 9025724). During the conference call, Twentymile argued that the subpoenaed individuals previously worked for Twentymile and are needed to provide testimony regarding the practice of “fishing,” i.e., the removal of materials from a conveyor via the use of a metal hook. The Secretary, in response, argued that the testimony of the subpoenaed individuals is not relevant given that the individuals are no longer employees of Twentymile and, rather, are now MSHA inspectors who were not present at the time the subject enforcement actions were issued and have never observed the practice of “fishing” as inspectors.

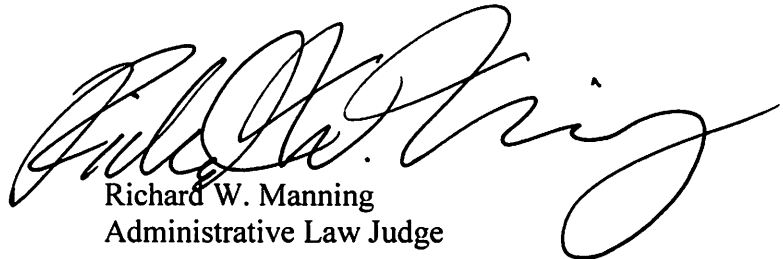
The Commission’s procedural rules grant its judges discretion to regulate discovery “to prevent undue delay or to protect a party or person from oppression or undue burden or expense” for “good cause shown.” 29 C.F.R. § 2700.56(c). Judges have utilized that discretion to “limit needless, speculative, overly broad, or duplicative discovery.” *North American Quarry and Constr. Services LLC*, 38 FMSHRC 583, 586 (Mar. 2016) (ALJ) (citations omitted). Judges are, similarly, afforded considerable discretion when it comes to regulating the course of a hearing and determining what to receive into evidence. 29 C.F.R. § 2700.55. Moreover, a judge may revoke a subpoena “for any other reason it is found to be . . . unreasonable.” 29 C.F.R. § 2700.60(c).

I find that the testimony sought from the subpoenaed individuals will be unreasonably cumulative or duplicative and can be obtained from witnesses currently employed by Twentymile. There has been no showing that the testimony of the two inspectors would present facts that only they possess. The subpoenaed individuals were not present at the time the subject citation and order were issued. Any testimony they could offer would relate to their general knowledge of the “fishing” process based on their time working at the mine prior to becoming MSHA inspectors. That same testimony can be obtained from others who are working at the mine, as evidenced by Twentymile counsel’s statement during the conference call that other witnesses would be called to testify about the practice of “fishing.” Counsel for Twentymile also argues that the inspectors may be able to offer information relevant to issues surrounding the high negligence and unwarrantable failure determinations set forth in the citation. I find that testimony concerning “fishing” and the inspector’s negligence and unwarrantable failure determinations “can better be obtained directly from individuals who have first-hand knowledge of those matters and who undoubtedly occupy positions of responsibility in the operator’s own organization.” *Martin Marietta Aggregates*, 20 FMSHRC 1239, 1240 (Oct. 1998) (ALJ) (Order quashing subpoena of MSHA special investigator in training).

It is important to note that in issuing the unwarrantable failure citation and imminent danger order, MSHA Inspector Rufus Taylor relied upon specific conditions that he observed at the time of his inspection. Even assuming that the two subpoenaed MSHA inspectors engaged in or had knowledge of “fishing” when they worked at the Foidel Creek Mine, they have no knowledge of the specific conditions that Inspector Taylor relied upon when issuing the citation and the imminent danger order.

It is quite apparent that Twentymile only seeks the testimony of these individuals because they are presently MSHA inspectors. If these same individuals had left the mine to start a business together, for example, Twentymile would not be seeking their testimony. Twentymile is also not seeking to call them as expert witnesses. Requiring these individuals to testify would take them away from the important work they do as inspectors and would be of no value to the court given that the same facts can be obtained from other witnesses.

For the reasons discussed above, the Secretary's motion is **GRANTED** and the subpoenas issued on January 8, 2018 for the hearing testimonies of Tracy Santistevan and Robert Teeter are **QUASHED**.



Richard W. Manning
Administrative Law Judge

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