CCASE:
CONTESTS OF REPPIRABLE DUST SAMPLE
DDATE:
19921029
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IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS) Master Docket No. 91-1

ORDER DENYING MOTION TO EXCLUDE CERTAIN TESTIMONY OF ROBERT THAXTON

On October 7, 1992, Contestants, by the Lead Defense Counsel Committee, filed a motion for an order precluding the Secretary from offering at the common issues trial testimony of Robert Thaxton relating to his March 1992 reclassification of the cited dust filters according to his tamper codes. On October 19, 1992, the Secretary filed a response to the motion asking that the motion be denied. On October 22, 1992, Contestants filed a reply to the Secretary's response. On the same day, Contestant U.S. Steel Mining Company, Inc. (U.S.M.) filed a separate reply. On October 26, 1992, the Secretary filed a motion to strike Contestants' and U.S.M.'s replies and, in the alternative, to accept the Secretary's response which she filed the same day. I am accepting and have considered the replies and the Secretary's response thereto in deciding the pending motion.

Factual and Procedural Background

The Secretary's Document 405 in the document repository is a computer data base providing information on each of the cited filters, including the mine identification number, cassette number, sampling date, weight, and the classification of the filter under one of the twelve tamper codes devised by Thaxton. Of the more than 5000 cited filters, 652 were included under tamper code 1, 4161 under tamper code 2, 36 under tamper code 3, and the remainder under the other nine tamper codes, varying from 4 to 293. This classification apparently took place over a period of time, but was certainly completed by July 1991, when the document repository was opened. Thaxton prepared a report entitled "`AWC' Citation Determination Report" on February 7, 1992, which was made available to Contestants shortly thereafter.

The Secretary and Contestants have engaged expert witnesses who analyzed the cited filters, compared them with experimental filters, and prepared reports directed in part to the question of the cause of the abnormal white centers and other phenomena observed in the cited filters. Under the Discovery Plan, as amended from time to time, expert witness reports were to be

exchanged by February 7, 1992, and expert witness depositions were to be completed by October 16, 1992. The latter was extended at Contestants' request to October 23, 1992. In March 1992, Thaxton made a "second review" of the cited filters, which involved the separation of the filter media and backing pad, apparently not done in the first examination. This second review resulted in changes of the tamper codes for 464 filters. The most significant changes were in tamper codes 2 and 3. Tamper code 2 is entitled "cleaned"; tamper code 3 is entitled "cleaned and coned". The number of filters included under tamper code 3 was increased from 36 to 440. The number of filters under tamper code 2 was reduced from 4161 to 3742. Thaxton prepared a report entitled "`AWC' Common Issues Report" on September 25, 1992, describing the changes in the tamper code assigned to each filter. This report also revealed that he reviewed approximately 5100 samples stored in the Pittsburgh Health and Technology Center which had been received from mine operators in November and December 1991 and June 1992 and which had not been cited. It further included an analysis of the experimental filters prepared by the R.J. Lee Group, Drs. Yao and Malloy, Dr. McFarland, and Dr. Grayson, all of whom are Contestants' experts, and Dr. Marple, an expert engaged by the Secretary. The report was made available to Contestants on September 25, 1992.

Contestants' motion argues that the reclassification of the filters was deliberately withheld from Contestants for more than 6 months, that the Secretary had the clear obligation to disclose this information, and that her failure to do so undermines Contestants' ability to prepare for the common issues trial. They assert that they have been seriously prejudiced and that the only appropriate sanction for the Secretary's misconduct is to exclude the evidence that was withheld. The Secretary argues that her burden is to establish that the weight of dust in the cited filters was deliberately altered, and the precise manner of the alteration (the tamper code) is not part of her burden of proof. The Secretary further assets that:

> The tamper code assignment during the second filter review did not ... involve any modification to any tamper codes during the first review which are set forth in Document 405 .... all that occurred was that a column was added to MSHA's data base to reflect the results of Thaxton's observation of the cited filters as they appeared in March 1992. This recordation did not change Thaxton's observations of the cited filters as they appeared during his initial review.

(emphasis in original). These assertions are further explained by the statement that the changed classification in some instances resulted from a change in the appearance of the filter

caused by handling and by the passage of time, and in other instances because Thaxton observed "coning" or "dimpling" on the filter after the backing pad was removed. If the Secretary is arguing that the March 1992 review did not result in a change in Thaxton's conclusions as to the nature of the AWC phenomena on the 464 filters which were reclassified, the argument is incomprehensible and is rejected.

Rule 26(e)

Rule 26(e)(1)(B) of the Federal Rules of Civil Procedure requires a party to seasonably supplement a response to a discovery request to include information subsequently acquired on the subject matter on which an expert witness is expected to testify at trial. Rule 26(e)(2)(B) requires a party to seasonably amend responses to discovery when the party learns that a prior correct response is no longer true, where failure to amend would result in knowing concealment. This requirement applies to all evidence and is not limited to expert witness testimony. Rule 26(e)(3) requires a party to supplement responses to discovery upon request made by the opposite party. In this proceeding Contestants have requested that the Secretary update the document repository.

If Thaxton is an expert witness, the Secretary was obliged by Rule 26(e)(1)(B) to seasonably disclose her March 1992 reclassification. Without regard to Thaxton's status, the Secretary was required to seasonably disclose the reclassification by Rule 26(e)(2)(B) and Rule 26(e)(3). Disclosure on September 25, 1992, of the March 1992 reclassification was not seasonable, particularly in view of the imminent completion of expert witness discovery. The failure to disclose a significant change in Thaxton's consideration of the filters for a period of more than 6 months was a clear violation of Rule 26(e).

Discovery Plan

The Discovery Plan governing discovery in this proceeding was amended on June 10, 1992, and provided in part as follows:

> (5) If any expert modifies or adds to the opinions previously expressed, opposing parties shall be promptly notified in writing of the opinion to which the expert is then expected to testify .... the opposing parties shall be given an opportunity for a reasonable time to depose that expert on such additional or modified opinions.

Thaxton has apparently not been identified as a generic expert, but as a case specific expert by the Secretary. Nevertheless,

the Discovery Plan requires the Secretary to promptly notify Contestants of the modification or addition to his previously expressed opinions. She failed to do so. I should note, however, that because of her failure I extended by 1 week the time for completion of Contestants' deposition of Thaxton which, at least in part, remedies the violation of the Plan.

Sanction

Contestants seek the exclusion of certain testimony of Thaxton. Rule 26(e) does not require the exclusion of evidence for a violation of the rule. However, if the trial judge deems it appropriate he may exclude evidence at trial for a violation of the rule's supplementation requirement which prejudices the opposing party. See Notes of Advisory Committee on 1970 Amendment to Rule 26, Federal Rules of Civil Procedure.

The exclusion of evidence is an "extreme" sanction. Dudley v. South Jersey Metal, Inc., 555 F.2d 96, 99 (3d Cir. 1977). In deciding whether to apply this extreme sanction or fashion another for the violation of the discovery rules, I must consider a number of factors:

1. The extent of the prejudice, if any, to the opposing party;

2. Whether the prejudice may be cured or lessened by a less extreme sanction than exclusion;

3. The importance of the testimony sought to be excluded to a fair and complete trial of the relevant facts and issues; and

4. Whether the violation resulted from bad faith or willfulness.

See Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 904-05 (3d Cir. 1977).

Contestants argue that because they were not informed of Thaxton's reclassification when it occurred, they were prejudiced in preparing their expert witness reports. In particular, they assert that the small number of cassettes originally classified under tamper code 3 (36) caused them to spend less time on the phenomenon of coning than they would have if they were aware of the number of cassettes so classified following the "second review" (440). There is no question that the withholding of the reclassification affected the way in which Contestants prepared for their expert witness testimony. It also affected their depositions of Mr. Thaxton. The prejudice is diminished however because of the extension of 1 week for the completion of Thaxton's deposition; by the fact that Thaxton's supplemental

report was made available September 25, 1992, prior to the completion of expert witness discovery; by the fact that the question of coning was considered and discussed in the reports and depositions of Contestants' experts; and by the fact that all the cited filters were made available for Contestants' inspection many months before Thaxton's supplemental report.

Contestants suggest that an alternative remedy would be to permit further scientific research by the Contestants' experts on the reclassification and allow the results of that research at the common issues trial. The prejudice to Contestants certainly would be lessened, if not cured, if they had the opportunity to conduct further experimentation on the phenomenon of coning.

Contestants state that the Secretary has made Thaxton a critical witness in these proceedings; that she "rested the full weight of asserting violations of the dust sampling regulations upon his subjective judgment alone." For precisely this reason, I would be reluctant to limit or exclude his testimony, lest in penalizing the Secretary, I also limit my ability to fully consider and understand the facts and the issues raised in these proceedings.

Contestants allege that the evidence of Thaxton's reclassification was deliberately withheld and imply that it resulted from bad faith. Bad faith on the part of counsel is not lightly presumed and I do not find that the evidence establishes it here. Contestants assert that Thaxton's reclassification was made known to the Secretary's expert, Dr. Marple while it was withheld from Contestants. The Secretary denies that she made it known to Dr. Marple. Contestants point to the Secretary's failure to disclose the existence of 5100 non-cited filters in the Pittsburgh lab and her failure to notify Contestants of her finding that snapping a cassette together could result in an AWC as showing bad faith. These are factors peripherally related, at best, to the subject of the motion before me. I do not conclude that they show bad faith. U.S.M. asserts that it was prejudiced in that its expert conducted little experimentation related to coning because none of U.S.M.'s cited filters were classified under tamper code 3. Following the March 1992 review, 5 filters were reclassified as tamper code 3. Thus, Dr. McFarland was deprived of the opportunity to conduct experiments related to the causes of coning. U.S.M. suggests that the trial judge might have accepted U.S.M.'s offer at the prehearing conference to be the subject of a bellwether trial had the reclassification been known. In fact, I decided against holding a bellwether trial involving any Contestant at that time, so the argument is irrelevant. U.S.M. suggests a hearing on the questions raised in the motion "not only regarding what has transpired, but to also ensure that such conduct does not reoccur." I believe that such a hearing would be counterproductive and is unnecessary to a proper decision on the motion.

Because the prejudice to the Contestants has been to some extent mitigated, because there is time prior to trial to further cure the prejudice, because the testimony is important to a fair and complete trial, and because bad faith or willfulness in failing to comply with the discovery requirements has not been shown, I will deny the motion to exclude. However, in an attempt to further cure the prejudice, I will permit Contestants to carry out further scientific studies related solely to the Thaxton reclassification and more specifically the coning phenomenon, provided that the studies shall be completed and the expert reports shall be served on the Secretary and filed with me (Footnote 1) on or before November 17, 1992.

ORDER

In accordance with the above discussion, IT IS ORDERED that

(1) the motion to exclude certain testimony of Robert Thaxton is DENIED.

(2) Contestants are granted time to conduct further scientific studies related solely to the Thaxton reclassification. Such studies shall be completed and reports shall be served on the Secretary and filed on or before November 17, 1992.

James A. Broderick
Administrative Law Judge

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1 I have issued a separate order directing that copies of all expert witness reports be filed with me by the same date.

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