

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Ave., NW Suite 520N
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January 16, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2011-129-M
Petitioner	:	A.C. No. 2402070-000232297
v.	:	
	:	
JOHN RICHARDS CONSTRUCTION	:	Mine Name: RICHARDS PIT
Respondent	:	

NOTICE OF HEARING and RULING ON MOTIONS

Hearing:

_____ Upon consultation with the parties it was agreed that **the hearing in this matter shall commence on Thursday, April 3, 2014.** The hearing location will be held in or as close as possible to **Missoula, Montana.** If the parties prefer, this hearing can also be set for **July 10, 2014.** The parties are directed to advise the Court as to the preferred date for the hearing. A subsequent notice shall note the date chosen and provide the courtroom location.

The hearing will be conducted in accordance with the Mine Act and the Commission’s Procedural Rules addressing the subject, as set forth at 29 C.F.R. Part 2700, Subpart G. The issues to be resolved are as identified in the pleadings.

Any party intending to offer exhibits at the hearing shall submit an exhibit list at the start of the hearing. Each exhibit shall be marked; each of the Secretary’s Exhibits are to be marked with a “P” or some other uniform designation, followed by a number, in sequence, and, in the same fashion, each of Respondent’s Exhibits are to be marked with an “R” or with some other uniform designation, followed by a number, in sequence. A copy of each exhibit is to be provided to the opposing side.¹ Each potential witness is also to be identified, along with a brief statement of the expected testimony from that witness. This exchange is to occur on or before February 28, 2014. Supplemental exchanges may be made as long as they are made in good faith and arising from information which was not reasonably available at the time of the initial exchange.

¹Any attendee requiring special accessibility features and/or any auxiliary aids (such as sign language interpreters) must make such a request sufficiently in advance of the hearing to allow for accommodation, subject to the limitations set forth in 29 C.F.R. §§ 2706.150(a) and 2706.160(d).

Ruling on Motions

_____ Having considered the Respondent's Motion requesting a hearing on MSHA's request to designate this matter for Simplified Proceedings, 29 C.F.R. Part 2700, Subpart J and Respondent's request for depositions, the Secretary's Response thereto, and "Defendants" Response to the Secretary's response, **the Court designates this matter for simplified proceedings and DENIES the Respondent's request for the taking of depositions.**

This case involves a single section 104(a) citation, in which the Secretary alleges a violation of 30 C.F.R. § 56.14112(b), a guarding standard which provides that "Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard." The citation alleges that a guard was not in place at a self-cleaning tail pulley at the bearing/take up area. Because of its location, away from the travel way, the citation was not designated as "significant and substantial" and the risk of injury was marked as "unlikely." This resulted in a proposed assessment of \$100.00 (one hundred dollars).

Respondent seeks to conduct depositions in this matter and asserts that it is entitled to a hearing, that MSHA has the burden of proof, and that it is entitled to "due process." Respondent's assertions are correct: it is entitled to due process, it does have a right to a hearing, and the Secretary, acting on behalf of MSHA, does have the burden of proof. The Secretary does not contest that the Respondent has a right to a hearing, nor that the burden of proof is on the Secretary. The Secretary also does not challenge the Respondent's claim to due process and each of these rights will be observed. The claimed "right" to take depositions, however, is another matter.

This matter fits squarely within the type of case that is completely appropriate for simplified proceedings. Pursuant to 29 C.F.R. § 2700.100, generally and, more particularly, applying § 2700.101, "Eligibility for Simplified Proceedings," the single citation involved here includes *all* of the characteristics identified in that provision. It is noted that, to fit within such eligibility, only "one or more" of those characteristics need be present; there is no requirement that all of the characteristics be present. Further, addressing the Respondent's general claim of entitlement to "due process," the Court informs that due process is a flexible concept. The process which is "due" is not uniform for every case that is litigated and this is true for all litigation disputes, not simply Mine Act matters. Affording the Respondent with a hearing, which includes the right to present witnesses on its behalf, as well as to cross-examine the government's witnesses, and to present exhibits, as well as to review the exhibits of the opposing side, all comport with satisfying due process. Depositions are not an essential part of due process for matters of this nature. *Starr v. Commissioner of Internal Revenue*, 226 F.2d 721(7th Cir. 1955), cert. denied, 350 U.S. 993 (1956). The Administrative Procedure Act contains no provision for pretrial discovery in the administrative process. *N.L.R.B. v. Vapor Blast Mfg. Co.*, 287 F.2d 402 (7th Cir. 1961), *Silverman v. Commodity Futures Trading Commission*, 549 F.2d

28, *33 (7th Cir. 1977). Here, with the prehearing exchange of expected witnesses, together with a statement about the subject of their testimony, and the exchange of all exhibits intended to be introduced, these disclosures insure that fundamental fairness will be present. In fact, the Secretary has stated that as of January 5, 2012, it had provided the Respondent with “the inspection file, [which] includ[ed] copies of the citation, [the] inspector’s field notes, and [the] inspection information form. Secretary’s Response to Respondent’s Request for Depositions at 2. Thus, Respondent will have been provided with “[t]he fundamental requirement of procedural due process [by] the opportunity to be heard ‘at a meaningful time and in a meaningful manner appropriate to the nature of the case.’” *Capital Cement Corp.*, 21 FMSHRC 883, 887 (Aug. 1999). *See also, Sec. v. Cactus Canyon Quarries of Texas, Inc.*, 2013 WL 1856602, March 2013 (Judge Barbour).

As the Secretary observes, pursuant to 29 C.F.R. §2700.107, discovery where a matter has been designated for simplified proceedings, is not permitted except as ordered by the Court. Significantly, as the Secretary also points out, even where a matter is *not* under simplified proceedings, the Court has the discretion to determine in any Mine Act matter whether discovery should be limited in the interests of time, burden to the parties, and expense. Discovery may be limited “to prevent undue delay or to protect a party or person from oppression or undue burden or expense.” 29 C.F.R. § 2700.56(c). Here, the reasons put forth by the Respondent in its “Defendants Response” simply asserts that due process includes depositions. As explained, that claim is incorrect and the Respondent has not offered any cognizable reason why the discovery allowed is insufficient.

So ordered.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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