

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 8, 2015

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

v.

CEMEX INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. SE 2014-453-M
A.C. No. 01-00016-357166

Mine: Demopolis Plant CEMEX Inc.

ORDER DENYING RESPONDENT'S MOTION IN LIMINE

The above-captioned case is before me upon the Secretary's petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d).

This case is currently scheduled for hearing on December 22, 2015. The Notice of Hearing issued several months ago instructed the parties to exchange a list of witnesses at least 20 business days prior to the start of the hearing (i.e., by November 23, 2015). On November 20, the Respondent filed a Motion for Summary Decision. On November 25, two days after the deadline to disclose witnesses, the Secretary notified the Respondent of his intent to call Thomas Barkand as an expert witness to respond to the Motion for Summary Decision. The Respondent has now filed a Motion in Limine asking me to exclude Barkand's testimony.

Parties' Positions

The Respondent argues that the Secretary's late disclosure of Barkand as a witness violates the deadline set forth in my Notice of Hearing; violates Commission Procedural Rule 56(e), 29 C.F.R. § 2700.56(e), which requires discovery to be completed at least 20 days before the hearing and states that discovery shall not unduly delay or impede disposition of cases; and contradicts the spirit of Commission Procedural Rule 67(a), 29 C.F.R. § 2700.67(a), which requires motions for summary disposition to be filed at least 25 days before the hearing, therefore contemplating that the parties will have established the evidentiary record by then. The Respondent further asserts that allowing Barkand to testify would be unfair, prejudicial, and would set a dangerous precedent for future cases.

The Secretary argues that the Commission's procedural rules have not been violated and that the addition of Barkand as a witness will not conflict with the Commission's flexible evidentiary rules or set a dangerous precedent. The Secretary concedes that the witness was disclosed two days after the deadline set forth in the Notice of Hearing, but asserts that the late disclosure was a mere oversight rectified by the Solicitor as soon as he realized that the deadline

was calculated in *business* days rather than regular days. The Secretary further contends that Barkand has been made available for deposition and that the Respondent has failed to make a showing of actual prejudice.

Discussion

Although the Secretary failed to promptly disclose Barkand as a witness, the disclosure nonetheless falls within the timeframe specified by the Commission's procedural rules for completion of discovery. Discovery must be completed at least 20 days prior to the start of the hearing under Rule 56(e). 29 C.F.R. § 2700.56(e). The witness was identified on November 25, which was more than 20 days before the start of the scheduled December 22 hearing.

The last-minute disclosure violated the deadline set forth in my Notice of Hearing. However, the Commission has indicated that the exclusion of evidence is an "extreme" sanction not normally to be imposed absent a showing of bad faith on the part of the proponent of the evidence. *Gray v. N. Fork Coal Corp.*, 35 FMSHRC 2349, 2360 (Aug. 2013) (citing *In re: Paoli Railroad Yards PCB Litigation*, 35 F.3d 717, 791-92 (3d Cir. 1994); *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 905 (3d Cir. 1977)). In *Gray v. North Fork*, the Commission held that the testimony of a late-disclosed witness should have been admitted in light of the lack of surprise to the opposing party, the importance of the testimony, the absence of bad faith or willfulness on the part of the proponent of the testimony, and the ability to cure any resulting prejudice. *Id.*; see also *Jim Walter Res., Inc.*, 37 FMSHRC 1958, 1965 (Sept. 2015) (permitting late disclosure absent showing of legal prejudice).

In this case, the subject matter of the testimony in question should not be a surprise to the Respondent, given that the main issue the witness will address (whether certain equipment falls within the regulatory definition of a "hoist") was raised during depositions and in the Respondent's Motion for Summary Decision. The testimony will be important to holding a fair and complete trial. The Respondent has not shown that the Secretary acted in bad faith or willfully disregarded my order in identifying Barkand as a witness two days late. Any prejudice resulting from the late disclosure can be cured by the less extreme sanction of continuing the hearing and discovery deadlines to give the Respondent time to address Barkand's testimony, and the Respondent will be granted a continuance to depose Barkand and call any rebuttal witness(es) if desired.

For the foregoing reasons, the Respondent's Motion in Limine is **DENIED**.



Priscilla M. Rae
Administrative Law Judge

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