FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 19, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. YORK 2014-28M A.C. No. 43-00490-335673
v.	
KIRK FENOFF & SON EXCAVATING, Respondent	Forest & Stream Gravel

ORDER

Before: Judge Moran

The Secretary has filed a motion to limit the Respondent's utilization of the discovery vehicle of written interrogatories to 25 (twenty-five) such inquiries ("Motion"). Initially, the Respondent filed 64 interrogatories and, with the Court's urging to see if the dispute could be resolved, that number was reduced to 39. The Secretary, believing the reduced number continuing to be excessive, filed the present motion. For the reasons which follow, the Court concludes that, consistent with the longstanding limit of 25 interrogatories under the Federal Rules of Civil Procedure, a party is presumptively limited to 25 questions in Mine Act litigation. Any party seeking more than the presumptive limit may be permitted to ask additional questions, but only after first applying to the Court for such relief and presenting the reasons justifying the request. After the opposing party has had an opportunity to respond, the Court will issue a ruling as to each requested additional question. This Order is being issued, in part, because Commission case law on this subject is sparse.

Background

Initially, it must be said that facts surrounding this matter do not appear to be exceptionally complex. Involving two section 104(d) orders, the first, citing 30 C.F.R. § 56.3200, asserts finding that "[t]he south east pit face was found to be undermined. The pit was evaluated to have a 30 foot wide X 15 foot high area undermined 2 ½ foot under the face. A vertical area above the affected area was evaluated to be 30 foot high to the catch bench. Multiple loader tracks and dig marks at the face toe and wall were observed. This condition creates a fall of material hazard. Kirk Fenoff, Owner engaged in aggravated conduct by knowing that miners had been loading from the pit high wall for periodically a two month period time. Mr. Fenoff has not gone to the pit in two months to examine the high wall for unsafe conditions." Order No. 8717168. The cited standard provides that "Ground conditions that create a hazard to

persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry."

With the second Order, No. 8717169, arising out of the same facts, it repeated the narrative of the first Order, but cited 30 C.F.R. § 56.3401, which provides that "Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant."

The Discovery Dispute

Per the Court's request following the parties' inability to resolve the dispute over the permitted number of interrogatories, the Secretary filed the instant Motion to Limit Respondent's Discovery Pursuant to F.R.C.P. 33. That provision from the Federal Rules states:

> Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2).

Rule 33(a)(1) Interrogatories to Parties

As noted, Respondent initially presented 64 interrogatories. Beyond that, the Secretary represents that the Respondent intends to depose the Inspector who issued the Orders. Motion at 2.

The Secretary acknowledges that interrogatories and other forms of discovery are permitted under the Commission's Procedural Rules, 29 C.F.R. Part 2700. ("Rules"). However, those Rules, while recognizing the right to obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence, also temper that right by providing that, upon motion, a party or a person from whom discovery is sought may seek to have the judge, for good cause shown, limit discovery 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). As the Secretary points out, that limitation on discovery is made in the context of the express statement about the rules' construction that they are intended "to secure the just, speedy and inexpensive determination of all proceedings." 29 C.F.R § 2700.1(c). *Id.* at 3.

The Secretary makes it plain that its argument is not directed at any particular questions among the 39 interrogatories. Rather, its contention is that exceeding the Federal Rules' limitation of 25 interrogatories is *per se* excessive, asserting that "[a]ny interrogatories in excess of twenty five are [inherently] oppressive and create an undue burden on the Secretary in light of the limited facts at issue in this docket." *Id.* In seeking to limit the Respondent to 25

interrogatories, the Secretary also notes that there is guidance in construing the Rules which provides that "'[o]n any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. 554 and 556), the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure…' [citing] 30 C.F.R. § 2700.1(b)." *Id.* In turn, the Secretary notes that the applicable Federal Rule of Civil Procedure, F.R.C.P. 33, states "unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. F.R.C.P. 33(a)(1)." *Id.*

Adding context to its argument, the Secretary reiterates that the two orders, arising out of the same essential facts, are of "relative factual simplicity" and that the Respondent's discovery plans include deposing its witness on the same matters.[1]

Anticipating a contention by the Respondent, that Commission Rule 56(b) allows parties to discover any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence and therefore implicitly rejects the FRCP limitation on the number of interrogatories, the Secretary observes that Rule 56 speaks to the *scope* of permissible discovery, not the *quantity* of questions permitted by interrogatories. The Court agrees with the Secretary's interpretation.[2]

In its Response to the Motion,[3] Respondent's Counsel "strongly takes issue with the Secretary's allegation that [it] is in any way abusing the discovery process, imposing an undue burden on the Secretary, or frustrating the expeditious resolution of this matter." Response at 2. Respondent, apparently with no priority among its present 39 interrogatories, believes that the Secretary should have answered the first 25 of those interrogatories, with the burden then falling on the Respondent to compel answers to the unanswered remainders. Not that answering the first

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[1] The Secretary also notes that courts have observed that using both interrogatories and depositions, though allowed, can be a source for oppression. *Schotthofer v. Hagstrom Const. Co.*, 23 F.R.D. 666 (S.D. Ill. 1958).

[2] Accordingly, this Court takes a different view from that expressed in *GTI Capital Holdings*, 23 FMSHRC 555 (ALJ 2001). In that case, another judge saw the respective burdens differently. While noting that Rule 56(c) permits a judge to limit discovery to prevent undue delay or to protect a party from oppression or undue burden or expense, that judge concluded that Federal Rule 33 does not apply to Commission proceedings and that a party must file a motion under Rule 56(c) to so limit discovery. It is true that although the Federal Rules do not *apply* to Commission proceedings, as noted, where a question is not regulated by the Commission's Rules, the Federal Rules of Civil Procedure are, where practicable, intended to be a source of guidance. Rule 2700.1(b). The difference between this Court and the view expressed in *GTI Capital Holdings* is one of the guidance of Rule 33 and upon which party should bear the burden of establishing that more questions should be permitted. In this Court's view, that burden should be on the party seeking to exceed the 25 question limitation.

[3] Respondent's Response incorrectly lists the docket in this matter as WEST 2014-103-M. That docket number involves an entirely different respondent and is not related to this matter in any way. However, the Respondent is the counsel for that other docket.

25 would have satisfied the Respondent, because it believes that answers to all of its interrogatories "are essential . . . to the just and speedy determination of this matter." *Id.*

The Respondent, while acknowledging that discovery, as identified under Rule 2700.56(a), may be limited per Rule 2700.56(c), asserts that it is up to the party seeking to limit such discovery to establish good cause for such limitations. *Sec'y of Labor v. Newmont Gold Co.*, 18 FMSHRC 1304, 1305 (Jul. 10, 1996) ("*Newmont Gold*").[4] The Court believes that the Respondent's arguments are misguided. This dispute is not about the scope of discovery and consequently the related argument of good cause for limiting discovery is not material.[5]

The Secretary's objections, for now, deal with the distinct issue of the number of interrogatories. When the Respondent actually does speak to the issue at hand, it contends that the Commission's Rules *do* address interrogatories and apparently takes the position that because interrogatories are listed among other discovery tools, there is no need to consult with the Federal Rules of Civil Procedure. The Court does not share the Respondent's view of the all-encompassing nature of section 2700.58 and its suggestion that the provision closes the door on the need to look outside of its words. Respondent then repeats its contention that the Secretary should have at least answered 25 of its interrogatories, subject only to raising objections to those 25. The problem with this assertion is that the Respondent never advised the Secretary *to only answer* the *first* 25, nor did it identify *any particular* 25 among the 37 (or 39, depending upon which party correctly added the number above 25), nor did it identify *any particular* 25 interrogatories among the 64 interrogatories it originally propounded.

Last, the Respondent, who is at least consistent, completes its response with arguments that are not germane to the present issue by noting that as "the Secretary has the burden of proof in this action, it is clearly within Respondent's purview to assess and question the written documentation that the Secretary asserts to support the citations prior to a deposition." Respondent adds, for good measure, that "the time and costs associated with taking depositions on the subject Orders without the benefit of written discovery responses would far outweigh the costs associated with written discovery, which Respondent could utilize to clarify and narrow the scope of the questions that it intends to ask the inspector during the deposition." Response at 5.

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[4] The decision of the administrative law judge in *Newmont Gold* did not deal with the number of interrogatories allowable. Instead, that decision's focus was upon the scope of discovery and whether depositions would be permitted for certain high level agency officials. In resolving that dispute, the judge in *Newmont Gold* balanced section 2700.56(b) allowing discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence against section 2700.56(c) which empowers a judge, for good cause shown, to limit discovery in order to prevent undue delay or to protect a party or person from oppression or undue burden or expense. Thus, this Court, apart from the non-binding nature of a fellow administrative law judge's rulings on other judges' determinations, concludes that *Newmont Gold* is not pertinent.

[5] From that incorrect starting point, Respondent turns to a series of arguments that are also not pertinent to the present issue, including the risk of being exposed to a pattern of violations charge and the contention that discovery is not limited by the size of a proposed penalty. Simply stated, these are not material to the present issue. Because several of the Respondent's contentions spring from similar incorrect premises, they are not specifically addressed.

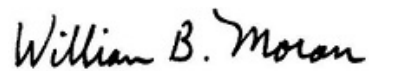
The Court's Determination

From the foregoing discussion it should be clear both that the issue to be decided is narrow and the Court's perspective on its resolution. The Commission's Procedural Rules do not speak to the number of interrogatories and, because of that silence, consultation with section 2700.1(b) is entirely appropriate.

Since 1993 the Federal Rules have reflected the determination that interrogatories should be limited to 25 without leave of court. As reflected in the following representative decisions, the resolution for this issue has been clearly articulated: *Chudasama v. Mazda Motor Corp.* 123 F.3d 1353 (11th Cir. 1997), *Walker v. Lakewood Condominium Owners Assn*, 186 F.R.D. 584 (Dist Ct C.D. Ca. May 26, 1999), observing that "Rule 33(a) expressly forbids a party from serving more than 25 interrogatories upon another party '[w]ithout leave of court or written stipulation.' Rule 33(a) was amended to include the numerical limit in 1993. The Rules' Advisory Committee Notes for the 1993 amendments further emphasize that '[t]he purpose of this revision [was] to reduce the frequency and increase the efficiency of interrogatory practice' since 'the device can be costly and may be used as a means of harassment.' See Advisory Committee Note to 1993 Amendment to Rule 33; Capacchione v. Charlotte–Mecklenburg Schools, 182 F.R.D. 486, 492 (W.D.N.C.1998); Safeco of America v. Rawstron, 181 F.R.D. 441, 443 (C.D.Cal.1998)." In *Safeco v. Rawstron*, 181 F.R.D. 44, (CD Ca. May 18, 1998) that court noted that "[t]he numerical limit was added in 1993. Before then, courts acknowledged that 'sheer numerosity is not an objection.'Compagnie Francaise d'Assurance Pour le Commerce Exterieur, 105 F.R.D. 16, 42 (S.D.N.Y.1984). As the Advisory Committee explained, '[t]he purpose of this revision is to reduce the frequency and increase the efficiency of interrogatory practice.' See Advisory Committee Note to 1993 Amendment to Fed.R.Civ.P. 33, 146 F.R.D. 675, 675 (1993). The amendment was based upon a recognition that, although interrogatories may be a valuable discovery tool, 'the device can be costly and may be used as a means of harassment....' Advisory Committee Note, 146 F.R.D. at 675. 'The aim [of the numerical limit] is not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery device.' Advisory Committee Note, 146 F.R.D. at 676."

This Court takes the same perspective as those courts. A party seeking to present more than 25 interrogatories bears the burden of demonstrating a particularized need for each additional interrogatory beyond the permitted maximum of 25. In this instance the Respondent needs first to identify the 25 interrogatories it wants answered. The Secretary has no obligation to respond until the 25 are identified. If the Respondent wants to present additional interrogatories, it will need to present those questions to the Court, along with the justification for each one. Following that, the Secretary will have an opportunity to respond and the Court will then issue its ruling.

So Ordered.



William B. Moran
Administrative Law Judge

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