

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 21, 2024

GRIMES ROCK, INC.,
Contestant

v.

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

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

v.

GRIMES ROCK, INC.,
Respondent

CONTEST PROCEEDING

Docket No. WEST 2022-0334-RM
§104(b) Order No. 9619115; 08/21/2022

Mine: Grimes Rock, Inc.
Mine ID: 04-05432

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2023-0015-M
A.C. No. 04-05432-563106-01

Docket No. WEST 2023-0016-M
A.C. No. 04-05432-563106-02

Mine: Grimes Rock, Inc.

ORDER GRANTING THE SECRETARY’S MOTION TO LIMIT DISCOVERY

These cases are before me upon a notice of contest filed by Grimes Rock, Inc. (“Grimes Rock”) and petitions for assessment of civil penalty filed by the Secretary of Labor (the “Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Grimes Rock 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 November 29, 2023, I lifted the stay in these matters and ordered the parties to confer regarding the possibility of settlement and, if settlement did not appear feasible, a timetable for submitting briefs or motions for summary decision. In response to that order, the Secretary notified the court that the parties were responding to written discovery and would confer with each other following that discovery to consider how to proceed in these cases. On December 13, I ordered the parties complete discovery as soon as possible and provide a status update to the court by January 31. On January 25, 2024, the Secretary filed a Motion to Limit Discovery. Grimes Rock opposed the motion. For reasons set forth below, the Secretary’s motion is **GRANTED**.

The contest docket and two penalty dockets at issue involve two 104(a) citations and one 104(b) order that arise from Grimes Rock’s alleged failure to comply with orders issued by former Commission Judge Miller in a temporary reinstatement proceeding involving Grimes

Rock, i.e., WEST 2021-0178-DM. Citation No. 9619114, issued under section 104(a) on August 15, 2022, alleges a violation of section 105(c) of the Mine Act because Grimes Rock failed to comply with Judge Miller's May 28, 2021 Order of Temporary Economic Reinstatement and June 17, 2022 Order Granting the Secretary's Motion to Enforce. Order No. 9619115, issued under section 104(b) on August 21, 2022, alleges that Grimes Rock continued to fail to comply with Judge Miller's orders by not making certain required payments. Finally, Citation No. 9619116, issued on August 22, 2022, under section 104(a), alleges that Grimes Rock violated section 104(b) when it continued to conduct work activities at the mine site despite not complying with Order No. 9619115. With that context in mind, I now turn my attention to the parties' arguments on the motion.

The Secretary, in her Motion to Limit Discovery, states that Grimes Rock "has served discovery which veers outside of the relevant and imposes an undue burden on the Secretary in litigating this case." Sec'y Mot. 2. In support of her motion, the Secretary raises three points.

First, the discovery served on the Secretary on January 23, 2024¹ "seeks facts and documents concerning MSHA's overall enforcement authority to conduct safety and health inspections at this mine and all communications between MSHA Inspector Ruben Bernal and the agency regarding those activities." Sec'y Mot. 2. However, the Secretary asserts that MSHA's authority under the Mine Act to conduct mandated inspections is not relevant to Grimes Rock's obligation to comply with the orders of an administrative law judge.

Second, the Secretary asserts that the discovery seeks information on "inspections conducted by and citations issued by MSHA Inspector Ruben Bernal in December 2023 and January 2024." Sec'y Mot. 3. However, that information is not relevant to Grimes Rock's failure to comply with the judge's order of June 2022 which led to the citations and order at issue in these proceedings.

Third, and finally, the "discovery seeks information that is deliberative and reflects the give and take of the consultative process." Sec'y Mot. 3 (Internal quotation omitted).

Consequently, given the undue burden created by requiring the Secretary to perform tasks to obtain unrelated, irrelevant and/or privileged information, the Secretary requests that the court "enter an order to limit discovery to relevant, non-privileged matter having to do with the citations at issue in these dockets, the facts that gave rise to the citations of record, and any documents not previously provided." Sec'y Mot. 4.

Grimes Rock argues that the Secretary's motion should be denied because the subject discovery is "directly relevant to Grimes' affirmative defense of retaliation/retaliatory motive." Grimes Rock Opp'n 2.² It asserts that the subject discovery seeks information and documents

¹ The Secretary's motion concerns a second set of discovery. According to the motion, Grimes Rock served a first set of discovery on January 12, 2024, to which the Secretary is currently preparing responses. Sec'y Mot. 2. n. 2

² Grimes also argues that this court presently lacks jurisdiction in this matter and asserts that the cases should be stayed. Those arguments will be addressed by a separate order.

relating to the reasons why MSHA inspected Grimes Rock's mine four times between December 19, 2023 and January 18, 2024, and is directly related to Grimes' affirmative defense that MSHA has engaged in a pattern of retaliation against Grimes Rock for exercising its rights. Grimes Rock Opp'n 6.

Further, Grimes Rock argues the Secretary failed to meet her burden of proving that the subject discovery seeks information and documents protected from disclosure by the deliberative process privilege. Grimes Rock Opp'n 9. It asserts that the Secretary did not provide an index of documents sought to be withheld so this court could determine whether those documents are subject to the asserted privilege. Grimes Rock Opp'n 10-11. It further asserts that, even if the Secretary were able to establish that the information and documents sought were both "pre-decisional and deliberative, Grimes' interest in disclosure greatly outweighs the Secretary's interest in non-disclosure." Grimes Rock Opp'n 11. As support, Grimes Rock points to the answers it filed in these matters and the "affirmative defense of retaliation/retaliatory motive, which puts the Secretary's and MSHA's policies and decision making in connection with its repeated inspections of Grimes' mine squarely at issue." Grimes Rock Opp'n 11.

The Commission's procedural rules state that "[p]arties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." 29 C.F.R. § 2700.56(b).

I find that the information and documents sought by Grimes Rock are not relevant to these proceedings and will not lead to the discovery of admissible evidence. The two 104(a) citations and one 104(b) order in these dockets were issued in August of 2022. The discovery sought by Grimes Rock includes information and documents relating to reasons why MSHA inspected the mine in December of 2023 and January of 2024, i.e., roughly a year and a half after the citations and order were issued. Although the Commission's rules on discovery are quite liberal, the information sought is so far outside the realm of the instant proceedings that it is entirely irrelevant.

I recognize that Grimes Rock is asserting an affirmative defense that MSHA engaged in a pattern of retaliation against Grimes Rock for exercising its rights. However, as a general matter, MSHA's motivation for issuing citations and orders is not the subject of Commission proceedings. *See Basin Resources Inc.*, 18 FMSHRC 1125 (June 1996) (ALJ), *Calvin Black Enterprises*, 5 FMSHRC 1440 (Aug. 1983) (ALJ).

The Mine Act authorizes MSHA to frequently inspect mines for violations of the Act or safety standards. Section 103(a) of the Mine Act requires MSHA to conduct inspections of each surface mine "in its entirety at least two times a year." 30 U.S.C. § 813(a). MSHA is not prohibited from inspecting a surface mine more than twice a year.³

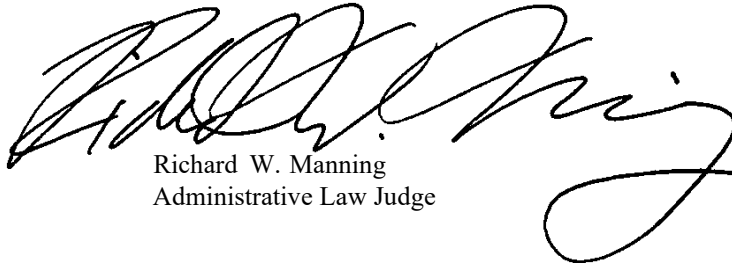
The issue in these cases is whether the Secretary can establish the three alleged violations by a preponderance of the evidence, not whether MSHA exhibited some sort of retaliatory

³ A single inspection of a mine can last more than one day. It appears that Grimes Rock's assertion that MSHA inspected the mine four times during December of 2023 and January of 2024 was based on it counting each day of multiday inspections as a separate inspection.

motive when issuing the citations and order. If the Secretary is unable to establish the violations by a preponderance of the evidence, the citations and orders will be vacated.

Because I find that the information and documents sought are not relevant to these proceedings and will not lead to the discovery of admissible evidence, I do not reach the parties' arguments regarding whether the materials are privileged.

Accordingly, the Secretary's Motion to Limit Discovery is **GRANTED** and the information and documents sought by Grimes Rock in its second set of interrogatories and second set of requests for production of documents need not be provided by the Secretary.



Richard W. Manning
Administrative Law Judge

Distribution (Via First Class Mail and email)

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