FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

March 18, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. NORTH AMERICAN QUARRY AND CONSTRUCTION SERVICES, LLC, Respondent.	:	CIVIL PENALTY PROCEEDING Docket No. YORK 2013-212-M A.C. No. 30-00287-330292 (2KX) Mine: Mt. Marion Pit and Mill
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. MARTY HARRINGTON, formerly employed by NORTH AMERICAN QUARRY AND CONSTRUCTION SERVICES, LLC, Respondent.	:	CIVIL PENALTY PROCEEDING Docket No. YORK 2015-134-M A.C. No. 30-00287-387349A Mine: Mt. Marion Pit and Mill

ORDER GRANTING THE SECRETARY'S MOTION TO COMPEL

These cases are before me upon the petitions for the assessment of civil penalty filed by the Secretary of Labor ("Secretary") pursuant to sections 105 and 110(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. §§ 815, 820(c).[1] I consolidated Docket Nos. YORK 2013-212-M and YORK 2015-134-M on December 8, 2015, and ordered the parties to comply with my Prehearing Order by no later than April 20, 2016.

On February 25, 2016, the Secretary filed a motion to compel North American Quarry and Construction Services, LLC ("NAQCS"), to produce requested discovery and to appear at a Rule 30(b)(6) deposition focusing on the business relationship between NAQCS and its parent

[1] On January 2, 2014, Chief Administrative Law Judge Robert J. Lesnick assigned me Docket No. YORK 2013-212-M. On April 14, 2014, I stayed this docket, yet allowed discovery to proceed, pending completion of the Secretary's related section 110(c) investigation. On September 25, 2015, the Secretary filed a petition in Docket No. YORK 2015-134-M, seeking penalties against Marty Harrington ("Harrington") under section 110(c). Chief Judge Lesnick assigned me Docket No. YORK 2015-134-M on December 2, 2015, attaching a copy of my Prehearing Order directing the parties to settle the case or position it for hearing within 140 days.

company, Austin Powder Company ("Austin Powder"). *See* Fed. R. Civ. P. 30(b)(6). NAQCS timely filed a response on March 7, 2016. On March 15, 2016, the Secretary filed a motion requesting permission to file a reply to NAQCS's response, which I hereby **DENY**.

I. Background and Issues

On August 19, 2015, the Secretary sent NAQCS a set of interrogatories and document requests. (Mot. at 6.) NAQCS objected to one interrogatory and eight document requests, which sought information about NAQCS's relationship with Austin Powder. (Mot. at 6–9.) NAQCS's objections stated that the information sought was irrelevant, overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and protected by the attorney-client privilege and work-product doctrine. (*Id.*) NAQCS provided no additional explanation in its initial objections. (*Id.*)

On October 21, 2015, the Secretary again requested this information, asserting its relevance to the Secretary's penalty assessment. (Mot. at Ex. K.) On November 10, 2015, NAQCS again refused to comply but indicated it would stipulate (1) to the operator's size alleged in the Secretary's Petition for the Assessment of Civil Penalty, and (2) that the Secretary's proposed penalty would not adversely affect the operator's ability to continue in business. (Mot. at Ex. L.) On January 13, 2016, the Secretary sent a final letter demanding the information and averring that NAQCS's proposed stipulations did not resolve the penalty issue. (Mot. at Ex. M.) On February 16, 2016, the Secretary served NAQCS with notice of its Rule 30(b)(6) deposition concerning these same topics. (Mot. at 2, Ex. A.) According to the Secretary, NAQCS will not comply with the notice. (Mot. at 2.)

In his motion, the Secretary argues he is entitled to conduct discovery on the relationship between Austin Powder and its subsidiary, NAQCS, to demonstrate that the two entities should be treated as a "unitary operator." (Mot. at 9–10.) The Secretary relies on the Commission's holding in *Berwind Natural Resources Corporation*, 21 FMSHRC 1284 (Dec. 1999), and claims Austin Powder may be held liable for both the violation and penalty in this matter under the unitary operator theory.[2] (*Id.* at 9–11.) The Secretary thus believes his discovery requests are necessary to determine the full extent of Austin Powder's control over NAQCS. (*Id.* at 11–12.)

In response, NAQCS argues that the Secretary's discovery requests are duplicative, are wasteful, and seek irrelevant information. (Resp. to Mot. at 2–5.) NAQCS asserts that the Secretary has already completed voluminous discovery on the unitary operator issue in separate proceedings before another Commission Judge involving Austin Powder and other subsidiaries (not NAQCS).[3] (*Id.* at 3.) NAQCS claims its relationship with Austin Powder has already been

---

[2] In *Berwind*, the Commission held that a corporation and its subsidiary may be considered a single operator under the Mine Act for purposes of establishing joint and several liability and assessing civil penalties. *See Berwind Natural Res. Corp.*, 21 FMSHRC at 1316.

[3] On March 27, 2015, Administrative Law Judge Kenneth R. Andrews consolidated sixteen dockets to determine preliminarily whether Austin Powder and a number of its subsidiaries constitute a unitary operator. *Austin Powder Co.*, FMSHRC Docket No. KENT

examined in those separate proceedings. (*Id.*) Furthermore, NAQCS argues that the requested information is irrelevant due to NAQCS's proposed stipulations, as well as Austin Powder's limited involvement in the events leading to the issuance of the citations here. (*Id.* at 4–5.)

Based on the parties' arguments, the following issues are before me — (1) whether information regarding NAQCS business relationship with its parent company, Austin Powder, is within the scope of discovery; and (2) whether providing the requested documents and an answer to the interrogatory and allowing the Federal Rule 30(b)(6) deposition would be duplicative and impose an undue burden on NAQCS.

II. Principles of Law

A. Scope of Discovery

Under Commission Procedural Rule 56, parties may use depositions, written interrogatories, requests for admissions, and requests for documents or objects to "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(a)–(b). A party served with a request for production must respond within 25 days of service and state the basis for any objections in its answer. 29 C.F.R. § 2700.58(c).

Commission Judges may look to the Federal Rules of Civil Procedure for guidance on any procedural question not governed by the Mine Act, the Commission's Procedural Rules, or the Administrative Procedure Act. 29 C.F.R. § 2700.1(b). Under Federal Rule 26(b)(1), a party may discover "any non[-]privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" Fed. R. Civ. P. 26(b)(1). The scope of discovery under the Federal Rules is "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Parties may depose company officials under Federal Rule 30(b)(6). Fed. R. Civ. P. 30(b)(6).

B. Limitations on Discovery: Undue Burden or Expense

Under Commission Procedural Rule 56(c), a Commission Judge may "limit discovery to prevent undue delay or to protect a party or person from oppression or undue burden or expense" for "good cause shown." 29 C.F.R. § 2700.56(c). This provision grants the Judge considerable discretion to regulate the course of discovery. *See also* 29 C.F.R. § 2700.55 (empowering Commission Judges to regulate the course of hearings, order depositions, and dispose of procedural requests).

2013-1078 (Mar. 27, 2015) (ALJ) (order). On March 9, 2016, Judge Andrews issued an order affirming the entities' "unitary operator" status. *Austin Powder Co.*, FMSHRC Docket No. PENN 2012-172 (Mar. 9, 2016) (ALJ) (order). However, NAQCS admits it was not a subsidiary involved in the consolidated proceedings before Judge Andrews. (Resp. to Mot. at 3.)

Although the Commission has not defined "good cause" or "undue burden," Commission Judges have relied on Commission Rule 56(c) to limit needless, speculative, overly broad, or duplicative discovery. *See Marfork Coal Co.*, 28 FMSHRC 742, 743 (Aug. 2006) (ALJ) (postponing "needless discovery" where contest cases had been stayed pending the proposal of civil penalties); *Eagle Energy, Inc.*, 21 FMSHRC 109, 113 (Jan. 1999) (ALJ) (denying motion to compel *in camera* review of documents where requesting party failed to make a "threshold showing identifying the nature of information to be discovered"); *Newmont Gold Co.*, 18 FMSHRC 1709, 1713–14 (Sept. 1996) (ALJ) (limiting deposition questions to prevent "broad, complicated, or lengthy hypothetical questions . . . that do not relate to the facts at issue"); *Scott McGlothlin v. Dominion Coal Corp.*, 36 FMSHRC 3049, 3051 (Nov. 2014) (ALJ) (granting motion to quash subpoena because information sought had already been obtained through other documentation and would not necessarily lead to relevant evidence).

A party objecting to a discovery request on the basis of undue burden or expense must demonstrate such a burden or expense. *See Greyeagle Coal Co.*, 35 FMSHRC 3321, 3327–29 (ALJ) (refusing to limit discovery because party failed to detail the burden or expense involved in responding to discovery request); *Rail Link, Inc.*, 20 FMSHRC 181, 182–83 (Jan. 1998) (ALJ) (denying motion for protective order because party failed to show the requested deposition would cause undue burden); *Newmont Gold Co.*, 18 FMSHRC 1304, 1306–08 (July 1996) (ALJ) (denying, in part, motion for protective order as depositions would not be overly burdensome).

III. Analysis and Conclusions of Law

A. Scope of Discovery – Relevancy

The Secretary seeks information to determine Austin Powder and NAQCS's unitary operator status. (Mot. at 11.) NAQCS argues the unitary operator issue was the focus of discovery with regard to Austin Powder's other subsidiaries, and the Secretary should not be permitted to delve into it again with NAQCS. (Resp. to Mot. at 2–4.)

Here, the interrogatory, eight document requests, and notice of deposition ask NAQCS to produce information pertaining to its corporate relationship with Austin Powder: contractual agreements between the two entities; NAQCS's placement within Austin Powder's organizational structure; NAQCS's leasing of employees; NAQCS's worker and unemployment compensation policies; any goods, products, or services Austin Powder provides to NAQCS; and Austin Powder's role in this litigation. (Mot. at 6–9, Ex. A.) Under *Berwind*, the Commission considers four factors to determine whether multiple entities will be treated as a unitary operator — (1) interrelation of operations; (2) common management; (3) centralized control over mine health and safety; and (4) common ownership. *Berwind*, 21 FMSHRC at 1317. The Secretary's discovery requests relate to each of the four *Berwind* factors and would allow the Secretary to identify whether Austin Powder could be jointly liable with NAQCS for both the violation and payment of the civil penalty. Thus, the information the Secretary seeks is quite relevant to the unitary operator theory, especially given that no legal determination by a Commission Judge has been made that NAQCS and Austin Powder are a unitary operator. Of course, a stipulation to the unitary operator issue and an unopposed motion adding Austin Powder as a party would obviate the need for any such discovery.

NAQCS next argues its offered stipulations about the Secretary's proposed penalty eliminate the relevance of NAQCS's relationship with Austin Powder. (Resp. to Mot. at 4.) Commission Judges, however, are not bound by the Secretary's proposed penalty assessment. *See, e.g., Sellersburg Stone Co.*, 5 FMSHRC 287, 290–93 (Mar. 1983), *aff'd*, 737 F.2d 1147, 1151–52 (7th Cir. 1984) ("[I]t is clear that under the [Mine] Act the Secretary of Labor's and the Commission's role regarding the assessment of penalties are separate and independent"). Consequently, information about the relationship between NAQCS and Austin Powder remains relevant to the Commission's own determination of the civil penalty in this matter. NAQCS's suggested stipulations, therefore, would not fully resolve the issue regarding the appropriate civil penalty.

Additionally, NAQCS argues that the information sought is not relevant to the actual violations at issue. (Resp. to Mot. at 4–5.) NAQCS claims the Secretary has no evidence that Austin Powder provided either the training or equipment that led to the violations. (*Id.*) Yet contrary to NAQCS's claim, the Secretary has provided evidence that NAQCS's employees drive vehicles carrying Austin Powder's logo and are subject to the Austin Powder Company Employee Handbook, which contains the company's safety policy. (Mot. at 10, Exs. J, C.) This evidence signals that a further inquiry into the extent of Austin Powder's involvement in NAQCS's operations is warranted.[4] The Secretary's discovery requests would lead him to the very information NAQCS claims the Secretary does not have. NACQS's circular reasoning why this information is not relevant therefore lacks merit.

Accordingly, I determine that the information the Secretary seeks in his discovery requests is relevant or appears likely to lead to the discovery of admissible evidence under Commission Rule 56, and is thus within the scope of discovery in this matter.

B. Undue Burden or Expense

NAQCS argues that the Secretary's discovery requests are duplicative and wasteful. (Resp. to Mot. at 2.) In support of this argument, NAQCS asserts that the Secretary has already completed voluminous discovery on the unitary operator issue in a separate Commission proceeding involving Austin Powder and a number of its other subsidiaries. (*Id.*)

NACQS, however, was not a party in any of the dockets contained in the separate action. (Resp. to Mot. at 3.) Non-parties who are not privy to a legal action generally cannot be bound by the adjudication of issues in that action. *Richards v. Jefferson Cty.*, 517 U.S. 793, 798 (1996) ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989))). Furthermore, although another Commission Judge ruled on the unitary operator

---

[4] A Commission Judge's decisions are not binding upon the Commission. 29 C.F.R. § 2700.69(d). Nevertheless, Judge Andrew's order affirming Austin Powder's unitary operator status with a number of its other subsidiaries strongly suggests that Austin Powder's control over its subsidiary NAQCS is a lot more pervasive than NAQCS seems to present. *Austin Powder Co.*, FMSHRC Docket No. PENN 2012-172 (Mar. 9, 2016) (ALJ) (order).

issue for other Austin Powder subsidiaries, decisions by a Commission Judge are not binding legal precedent. 29 C.F.R. § 2700.69(d). Thus, whether Austin Powder and NAQCS may be considered a unitary operator remains at issue in the matter before me. Accordingly, I determine that discovery by the Secretary on the issue would not be duplicative or wasteful.

Finally, NAQCS provided no information about the burden or expense of complying with the discovery. Based on the information before me, the discovery sought by the Secretary does not appear to be needless, speculative, overly broad, or duplicative. Rather, the discovery appears relevant and sufficiently tailored to the unitary operator issue. Lacking any additional details regarding the burden or expense of producing the requested information, I therefore determine that NAQCS has not demonstrated any undue burden or expense. Absent good cause, I conclude there is no basis to limit the Secretary's pending discovery requests.

IV. Order

Based on the above reasoning, the Secretary's motion to compel is **GRANTED**. It is hereby **ORDERED** that NAQCS shall (1) identify and produce the documents in the Secretary's eight document requests, unless otherwise privileged; (2) provide an answer to the Secretary's interrogatory; and (3) designate a person or persons to appear at the Secretary's properly noticed Rule 30(b)(6) deposition.[5]

Alan G. Paez
Administrative Law Judge

Distribution (Via Electronic Mail & U.S. Mail):

Patrick M. Dalin, Esq., U.S. Department of Labor, Office of the Solicitor, 201 Varick Street, Room 983, New York, NY 10014
(dalin.patrick@dol.gov)

David J. Hardy Esq., Hardy Pence PLLC, P.O. Box 2548, Charleston, WV 25329-2548
(dhardy@hardypence.com)

Robert B. Allen, Esq., Kay Casto & Chaney PLLC, P.O. Box 2031, Charleston, WV 25327
(rallen@kaycasto.com)

/ivn

---

[5] Under the Commission's rules a party that fails to comply with an order compelling discovery may be subject to an order, as is just and appropriate, in favor of the party seeking discovery, including deeming as established the matters sought to be discovered or dismissing the proceedings altogether. 29 C.F.R. § 2700.59.