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

March 30, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JEFFREY PAPPAS, Complainant,	: : : : :	DISCRIMINATION PROCEEDING Docket No. WEST 2016-264-DM WE MD 16-02
v.	: : :	
CALPORTLAND COMPANY, and RIVERSIDE CEMENT COMPANY, Respondents.	: : :	Mine ID 04-00011 Mine: Oro Grande Quarry

ORDER DENYING MOTION TO EXCLUDE WITNESSES AND ORDER DENYING MOTION FOR SANCTIONS

This case is before me upon a complaint of discrimination filed by the Secretary of Labor ("Secretary"), on behalf of Jeffrey Pappas against CalPortland Company ("CalPortland") and Riverside Cement Company ("Riverside" or "RCC"), pursuant to section 105(c)(2) of the Federal Mine Safety and Health Review Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(2). Chief Administrative Law Judge Robert J. Lesnick assigned the matter to me on March 11, 2016. On April 14, 2016, I issued a Notice of Hearing, which set this matter for hearing and provided guidelines for discovery. I held a hearing on December 6–9, 2016, in San Bernardino, CA.

Four days before the hearing on December 2, 2016, the Secretary filed a Motion in Limine to Exclude Riverside Cement Company Witnesses. Riverside filed a timely response on December 16, 2016, after I extended the filing deadline at the hearing. Additionally, the Secretary filed a Motion for Sanctions for Spoliation of Evidence against CalPortland on December 2, 2016. CalPortland timely filed a response on December 5, 2016. At the beginning of the hearing, the parties presented brief arguments on the two motions. (Tr. 12:4–16:24, 19:8–21:2.) I informed the parties that I would issue my rulings on the two motions with the decision. (Tr. 16:25–17:2, 21:17–21.) Given the number of issues and volume of the record present in this matter, I now issue this separate order.

For the reasons stated below, the Secretary's Motion in Limine to Exclude Riverside Cement Company Witnesses is hereby **DENIED**, and the Secretary's Motion for Sanctions for Spoliation of Evidence against CalPortland is hereby **DENIED**.

I. ORDER DENYING MOTION TO EXCLUDE WITNESSES

The Secretary's motion in limine seeks to exclude testimony by Jamie Ambrose and David Salzborn because the Secretary was not made aware that Riverside intended to present their testimony until they were listed in Riverside's prehearing statement on November 22, 2016.

(Mot. to Exclude at 1–2; Tr. 12:4–13:2.) The Secretary asserts that during discovery Riverside represented it did not have access to Ambrose and Salzborn when answering interrogatories and then designated a company representative who was unable to answer questions regarding Pappas's work history during a Fed. R. Civ. P. 30(b)(6) deposition. (Mot. to Exclude at 2–7; Tr. 12:4–13:2.) The Secretary states that had he known Riverside intended to present the testimony of Ambrose and Salzborn, the Secretary could have moved to compel answers regarding their testimony during discovery, but did not have the opportunity to do so. (Mot. to Exclude at 5.) The Secretary asserts that the testimony should be excluded because of Riverside's late disclosure. (*Id.* at 5–6.)

In response, Riverside explains that Ambrose and Salzborn are necessary rebuttal witnesses. (RCC Resp. at 1, 8.) Riverside argues that it never claimed it did not have access to these individuals, but merely answered that they were beyond Riverside's control because Ambrose and Salzborn are no longer Riverside employees. (RCC Resp. at 2; Tr. 13:17–2.) Riverside notes that the Secretary was well-aware of the two witnesses' identities, but never requested to depose either witness. (RCC Resp. at 2–3.) Furthermore, Riverside argues that the Secretary failed to timely express his dissatisfaction regarding Riverside's discovery answers. (*Id.* at 3–6; Tr. 13:12–16.)

Commission Judges have broad authority to regulate the conduct of parties in proceedings before them. 29 C.F.R. § 2700.55; *Mark Gray v. North Fork Coal Corp.*, 35 FMSHRC 2349, 2359 (Aug. 2013). Excluding evidence is an extreme sanction not to be imposed absent a showing of willful deception or flagrant disregard. 35 FMSHRC at 2360 (citations omitted). Here, neither witness had been employed by Riverside since September 30, 2016, so Riverside's representations were accurate. Further, the Secretary had ample opportunity spanning over a year to depose Ambrose and Salzborn if he so chose. Indeed, the Secretary has long known about Ambrose and Salzborn's identities, which came up in MSHA Special Investigator Kyle Jackson's interviews in November 2015. (Tr. 514:9–23, 530:3–19; Exs. S–17, S–18, S–22.) Indeed, counsel for the Secretary clearly knew of these witnesses and their potential importance to this case from the testimony given at the Temporary Reinstatement hearing I held in January 2016; and, I set the December 2016 merits hearing in April 2016 providing ample time for discovery. Moreover, Ambrose is in fact employed by CalPortland, another party to this case from which the Secretary could have requested the sought-after information. Because the Secretary's motion fails to show he made any attempt to depose or obtain contact information for either witness, I cannot conclude that Riverside demonstrated willful deception or flagrant disregard to the Secretary's discovery requests.

Accordingly, the Secretary's motion to exclude these witnesses is **DENIED**.

II. ORDER DENYING MOTION FOR SANCTIONS

The Secretary's motion for sanctions seeks an adverse inference against CalPortland as a remedy for CalPortland's alleged spoliation. (Mot. for Sanctions at 1–6.) On October 31, 2016, just five weeks before hearing, the Secretary requested from CalPortland all the application materials for miners it did not hire on October 1, 2015, which CalPortland could not provide. (*Id.* at 4; Daquiz Decl. at 2.) The Secretary now asks me to draw an adverse inference that the

missing applications demonstrate that CalPortland selectively denied employment to miners who had engaged in protected activity under the Mine Act, rebutting CalPortland's assertion that the unhired miners performed worse during the application process. (*Id.* at 3.)

In response, CalPortland argues that (1) the applications are not relevant, (2) the Secretary received information regarding applicants CalPortland did not hire in its initial 2015 investigation, and (3) CalPortland diligently searched for the materials in November 2016 when the Secretary requested additional information regarding the applicants not hired, but the applications could not be found. (CalPortland Mem. in Resp. at 1–22.) CalPortland admits that the applications were destroyed, though inadvertently and unintentionally. (*Id.* at 13–14.)

A party is under a duty to preserve evidence in its possession when the party knows that the evidence is potentially relevant to litigation before the evidence was destroyed. *Leon v. IDX Systems Corp.*, 464 F.3d 951, 959 (9th Cir. 2006). If a duty exists, the prejudice suffered by the party seeking sanctions must be considered before determining the appropriate sanction. *See id.* at 958–960 (noting the risk of prejudice must be considered before determining whether dismissal is an available sanction). When a party does not preserve evidence in its control, a judge can draw an adverse inference that the evidence destroyed would have been unfavorable to the destroying party. *See IO Coal Co.*, 31 FMSHRC 1346, 1359 & n.11 (Dec. 2009).

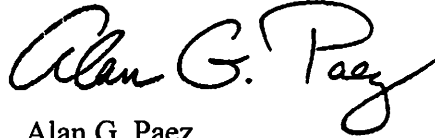
Here, CalPortland provided the Secretary a sample of applications of miner applicants who were not hired during MSHA's initial November 2015 investigation. (Mot. for Sanctions at 4.) Thereafter, in July 2016, the Secretary requested "all documents related to the hiring of all personnel and employees at the Mine" during discovery; but due to the poor drafting of the Secretary's request (which referred to "all personnel and employees"), CalPortland believed it only needed to produce the applications of hired miners, not unhired miner applicants. (*Id.*; Daquiz Decl. at Ex. A, B; Lundgren Decl. at Ex. 1–4.) Not until October 31, 2016, did the Secretary clarify that the request was to include the applications of unhired miner applicants. (Daquiz Decl. at 2; Lundgren Decl. at Ex. 1–2.) In November, CalPortland attempted to locate those applications but discovered the materials must have been destroyed. (CalPortland Mem. in Resp. at 13–14.)

Because the applications of miners who were not hired by CalPortland were subject to MSHA's initial investigation in November 2015, I find that CalPortland knew it had a duty to preserve those applications in anticipation of litigation. However, I do not find that CalPortland intentionally destroyed those applications in light of CalPortland's cooperation in producing the applications during MSHA's initial request and its effort to locate the documents after the Secretary's later request. Moreover, because the Secretary had already received a sample of those applications, I determine that the prejudice suffered by the Secretary does not warrant the severe sanctions requested.

Accordingly, the Secretary's motion for sanctions against CalPortland is **DENIED.**

III. ORDER

Based on the reasons above, the Secretary's Motion to Exclude Witnesses and the Secretary's Motion for Sanctions are hereby **DENIED**.



Alan G. Paez
Administrative Law Judge

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

Abigail Daquiz, Esq., U.S. Department of Labor, Office of the Solicitor, 300 Fifth Avenue, Suite 1120, Seattle, WA 98104-2397
(daquiz.abigail@dol.gov)

Sonya P. Shao, Esq., U.S. Department of Labor, Office of the Solicitor, 350 South Figueroa Street, Suite 370, Los Angeles, CA 90071-1202
(shao.sonya.p@dol.gov)

Brian P. Lundgren, Esq., and Erik M. Laiho, Esq., Davis Grimm Payne & Marra, 701 Fifth Avenue, Suite 4040, Seattle, WA 98104
(blundgren@davisgrimmpayne.com)
(elaiho@davisgrimmpayne.com)

Karen L. Johnston, Esq., Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202
(kjohnston@jacksonkelly.com)

Jeffrey Pappas, 12279 Merrod Way, Victorville, CA 92395-9774
(U.S. Mail Only)

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