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April 2, 2018

LEDCOR CMI, INC., Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	CONTEST PROCEEDING Docket No. WEST 2017-0231-RM Order No. 8989354; 10/06/2016 Cemex – Sierra Stone Quarry Mine ID: 26-02082 R810
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. LEDCOR CMI, INC., Respondent	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2017-270-M A.C. No. 26-02082-430548 R810 Docket No. WEST 2017-290-M A.C. No. 26-02082-424968 R810 Cemex-Sierra Stone Quarry

ORDER GRANTING, IN PART, THE SECRETARY'S MOTION TO COMPEL

Before: Judge Manning

These cases are before me upon a notice of contest filed by Ledcor CMI, Inc. ("Ledcor") and two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Ledcor 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"). The cases involve a citation issued under section 104(d)(1) of the Mine Act, two orders issued under that same section, and a section 104(b) order. These enforcement actions were issued in early October 2016. The cases involve issues surrounding the condition of highwalls at the quarry. Ledcor was an independent contractor at the mine.

During the course of discovery, the Secretary filed a motion entitled "Secretary's Motion to Compel Respondent's Further Responses to the Secretary's Interrogatories and Requests for Admissions." Ledcor filed an opposition to the Secretary's motion and, with permission of this court, the Secretary filed a reply. The Secretary's motion seeks further responses with respect to four categories of discovery requests. The arguments of the parties set forth below are very brief summaries of the more detailed arguments that are set forth in the motion and responses. The headings below are taken directly from the Secretary's motion.

A. Respondent Must Identify Which of the More than 1250 Pages of Documents It Produced Are Responsive to Interrogatories 4 and 25.

Interrogatory 4 asked Ledcor to provide information about internal communications regarding the status of ground conditions at the highwalls, removing blasted rock from the highwalls, hauling rock from the highwalls, addressing ground conditions and/or erecting barricades to block access to the highwalls. Interrogatory 25 requests that Ledcor provide a description of the work it contracted with Cemex to perform at the 99 Pit, including the dates the work began and ended.

The Secretary states that Ledcor responded to these interrogatories by referring to documents produced in response to the Secretary's requests for the production of documents. He states that Ledcor produced 1250 pages of documents and has refused to specify which of these documents are responsive to the two interrogatories. The Secretary argues that this court should compel Ledcor to designate the specific documents that respond to the interrogatories and, in the case of longer documents, the specific pages within the designated documents that respond to the interrogatories. He relies on the Federal Rules of Civil Procedure for guidance ("Federal Rules"). Rule 33 provides, in part, that if the answer to an interrogatory may be determined by examining a party's records and if the burden of ascertaining the answer will be substantially the same for either party, the responding party may answer an interrogatory by "specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could[.]" Fed. R. Civ. P. 33(d)(1). The Secretary maintains that a responding party ordinarily complies with this rule by specifying the Bates numbers of the documents that the responding party considers responsive to the interrogatory. Although Rule 33(d) relieves a party from the burden of compiling information from the documents to answer the interrogatory, the rule "does not relieve the responding party from pointing out the documents from which the answer can be discovered." Sec'y Mot. 5, quoting *In re Ethicon Inc. Pelvic Repair Systems Product Liability Litigation,* No. MDL 2327, 2013 WL 8744561 (S. D. W. Va. July 26, 2015) (citations omitted).

In response, Ledcor states that it provided indices for its document productions. Its first production of documents contains an index in the electronic file that allows the Secretary to find and navigate directly to specific documents. In its second production, the electronic documents contain a "corresponding index of the files containing their metadata, e.g., the information for the date, to, from, copied to, and subject line or title of each electronic file produced with a reference to its production number." Ledcor Response 3. In addition, both production responses were provided electronically so they are "full-text searchable as well." *Id.* Ledcor goes on to state:

> While it is true that federal courts handling complex litigation have required that responding parties identify the Bates numbers of documents in very large document productions, where, as here, the production of records is largely confined to the issue of ground control safety at the mine, Ledcor's production of indices to its document production is not only sufficient, but contains more identifying information about the particular documents than a mere recitation of Bates numbers.

Id. at 6. Ledcor also argues that it provided other information to the Secretary that answers the subject interrogatories. For example, Ledcor provided a copy of the contract between it and Cemex that contains provisions describing the scope of Ledcor's work at the mine.

In his reply, the Secretary argues that the pdf bookmarks Ledcor included in its document production do not contain any information identifying that the produced documents are responsive to Interrogatories 4 or 25, nor do they identify whether the produced documents have any relevance to the issues in this matter. The bookmarks in the pdf documents provide some information relevant to Ledcor's document tracking system, but do not contain any information stating that any of the documents are responsive to the interrogatories. In addition, Commission Procedural Rule 58(a) requires a party to "answer each interrogatory separately and fully in writing." 29 C.F.R. § 2700.58(a). This rule essentially negates Ledcor's reliance on Federal Rule 33(d) because the Commission has a specific rule on the subject. The Secretary states that he is willing to accept Ledcor's response to the interrogatories rather than a written response so long as Ledcor specifically identifies those pages of the documents provided that respond to the specific interrogatories.

The Commission's procedural rules apply to all proceedings before Commission administrative law judges. They are designed to "secure the just, speedy and inexpensive determination of all proceedings[.]" 29 C.F.R. § 2700.1(c). To keep the rules simple, they do not cover every situation that may arise before a judge. The rules provide that on any procedural question not regulated by the Mine Act, the Commission's procedural rules, or the Administrative Procedure Act, the "Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure[.]" 29 C.F.R. § 2700.1(b).

Commission Procedural Rule 58(a) clearly provides that a "party served with interrogatories shall answer each interrogatory separately and fully in writing under oath[.]" 29 C.F.R. § 2700.58(a). The Secretary, in this instance, is willing to waive this requirement and to accept documents provided in response to his request for production of documents so long as Ledcor specifically designates the particular pages that provide information in response to the interrogatories. Although Ledcor provided bookmarks (indices) with the electronic documents, it did not indicate which documents or pages of documents answer the two interrogatories. A portion of these bookmarks were provided at pages 4 and 5 of its opposition to the Secretary's motion to compel. These indices do not in any fashion indicate what documents or pages of documents answer Interrogatories 4 and 25. I find that Ledcor has not complied with Commission Procedural Rule 58(a) or Fed. R. Civ. P. 33(d)(1). The Secretary's motion to compel further responses to Interrogatories 4 and 25 is **GRANTED**. Ledcor is **ORDERED** to either (a) answer these two interrogatories "separately and fully in writing under oath" or; (2) identify the documents and the pages within lengthy documents that answer each interrogatory.

B. <u>Respondent Must Respond to Interrogatories 26 through 49 as the Commission Has Held the FRCP 33(a)'s "25 Limit" Does Not Apply to Commission Matters</u>.

The Secretary states that he propounded Interrogatories 26 through 49 in order to obtain specified material facts that relate to the enforcement actions taken in these cases and Ledcor's

defenses to them. Ledcor objected to these interrogatories based on its position that a party can propound no more than 25 interrogatories in matters before the Commission. The Secretary disagrees with Ledcor's position on this issue based on an order issued by this court. In its response, Ledcor cited to orders issued by Judge William Moran. In the cases before judge Moran, it was the Secretary that sought to limit the number of interrogatories he had to answer. Ledcor argues that the Secretary cannot have it both ways.

The Commission has not ruled on the issue in question. The only orders issued by administrative law judges discussing this issue are the three discussed by the parties. The Commission has held that Procedural Rule 1(b):

> does not dictate that any particular Federal Rule of Civil Procedure be reflexively applied in Commission proceedings on procedural questions not regulated by the Mine Act, the Administrative Procedure Act, or our own procedural rules. Rather Procedural Rule 1(b) merely states that in such circumstances, the Commission and Commission judges are to be "guided so far as practicable" by the Federal Rules of Civil Procedure "as appropriate." Plainly, Procedural Rule 1(b) reserves to the Commission [and its judges] considerable discretion in deciding whether and to what extent it is to be "guided" by a particular Federal Rule of Civil Procedure.

Rushton Mining Co., 11 FMSHRC 759, 765 (May 1989). In *GTI Capital Holdings LLC d/b/a Rockland Materials*, I held that Federal Rule 33's provision limiting the number of interrogatories to 25 does not apply to Commission proceedings because our procedural rules provide that a party "may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appear likely to lead to the discovery of admissible evidence." 23 FMSHRC 555, 557 (May 2001) (ALJ); Comm. Rule 56(b)). There is no limitation of the number of interrogatories that a party may serve. I also stated that a party may file a motion to limit discovery to protect a party from "oppression or undue burden or expense." *Id.*; Comm. Rule 56(c).

In one of his cases, Judge Moran noted that 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." *Kirk Fenoff & Son Excavating*, 36 FMSHRC 3339 (Dec. 2014)(ALJ). In reaching his conclusions, he cited the history of Fed. R. Civ. P 33, particularly the Advisory Committee Notes for the rule. These Notes indicate that the Committee was concerned that interrogatories "may be used as a means of harassment" and the 25 interrogatory limit was included to "provide judicial scrutiny before parties make potentially excessive use of this discovery device." *Id.* (citations omitted). Judge Moran held that in cases before his court a "party seeking to present more than 25 interrogatories bears the burden of demonstrating a particularized need for each additional interrogatory beyond the maximum of 25." *Id.* In *Bing Materials*, Judge Moran determined that the numerical limitation should be "presumptive" absent a showing of a "particularized need" for additional interrogatories. 39 FMSHRC 419 (Feb. 2017)(ALJ).

I do not need to reach the issue whether there should be a presumptive numerical limitation because I can resolve the issue on very practical grounds. I conclude that if I apply the principles that have developed under the Federal Rules, Ledcor should be required to respond to all 49 interrogatories. The Federal Rule limits the number of interrogatories to 25 "*including all discreet subparts*." Fed. R. Civ. P. 33(a)(1) (emphasis added). "Although the term 'discrete subparts' does not have a precise meaning, courts generally agree that 'interrogatory subparts are to be counted as one interrogatory ... if they are logically or factually subsumed within and necessarily related to the primary question.'" *Trevino v. ACB Am., Inc.*, 232 F.R.D. 612, 614 (N.D. Cal. 2006) (citations omitted); *see also Swackhammer v. Sprint Corp. PCS,* 225 F.R.D. 658, 664–65 (D. Kan. 2004) ("[A]n interrogatory containing subparts directed at eliciting details concerning a 'common theme' should generally be considered a single question."). Thus, a skilled attorney can often organize his or her interrogatory questions under the Federal Rules to obtain the needed information in 25 interrogatories by carefully including related requests in a single interrogatory.

In reviewing the interrogatories propounded by the Secretary in these cases, I find that a large number of them could have been combined. Exhibit A to Sec'y Mot. For example, Interrogatory 25 asks about the scope of Ledcor's work as a contractor at the mine, Interrogatory 26 asks for the identification of persons with knowledge of the facts relied upon to respond to Interrogatory 25, and Interrogatory 27 asks for the identification of any documents relied upon in the response to Interrogatory 25. These interrogatories could have been written as one interrogatory or the second two interrogatories could have been included as subparts of the first under the Federal Rules. A great number of the Secretary's interrogatories are organized in the same three-part manner. If the Secretary's counsel had been specifically required by the Commission's rules to limit the number of interrogatories in these cases, she could have propounded 25 interrogatories asking for the same information as she did in 49 interrogatories.[1] Thus, Ledcor's objection stresses form over substance.

I have reviewed Interrogatories 26 through 49 and I conclude that they relate to the Secretary's enforcement actions and Ledcor's defenses to them. Ledcor's objection to the interrogatories is based solely on the number propounded and not on the subject matter of Interrogatories 26-49. As discussed above, a large number of the interrogatories propounded are interrelated and could have been combined so that only 25 interrogatories would have been necessary. There has been no showing that the interrogatories were propounded for the purpose of harassment, oppression, or to unduly burden Ledcor. For the reasons set forth above, the Secretary's motion is **GRANTED** with respect to this issue. Ledcor is **ORDERED** to answer Interrogatories 26 through 49.

C. Respondent Did Not Provide a Complete Response to Interrogatories 7, 10, and 16 As It Unilaterally Limited its Response to a Particular Day.

Interrogatory 7 requests information regarding specific mining activities that took place at the Mid-Level bench during the six-month period before the subject inspection. The Secretary is seeking this information because Ledcor contends that there was no mining being conducted at

[1] By my count, if the Secretary had combined the related interrogatories, the total number would have been about 20.

the Mid-Level Bench at the time of or prior to the subject inspection. Interrogatories 10 and 16 asked for the same information as Interrogatory 7 except they cover the Upper Level Bench and the Lower Level Bench respectively. Ledcor objects to these interrogatories because they are overbroad and unduly burdensome.

The Secretary stated that counsel met in person on February 1, 2018 to discuss the cases and the topics discussed included discovery issues. Counsel for the Secretary states that during this "meet and confer process," she agreed to narrow the scope of these interrogatories only to activities related to blasting, scaling, and barricading, but Ledcor did not provide further information. The Secretary argues that when a party maintains that an interrogatory is unduly burdensome, that party has the burden of demonstrating the nature of the burden involved. He contends that Ledcor has not provided sufficient evidence to demonstrate an undue burden or expense.

In response, Ledcor states that it detailed the significant events that occurred at each bench of the mine, including the dates of last known mining operations, the most recent dates of blasting, and the safety precautions taken at the end of mining the particular bench. Ledcor stated in its objections that it was limiting its responses to "the subject matter of the relevant citations, namely ground control hazard avoidance activities at the mine." Ledcor Response at 10 (citation omitted).

In the his reply, the Secretary states that, during the "meet and confer process," Ledcor attempted to direct the Secretary's method of discovery by suggesting that any further information on the subject issues can be obtained during depositions. Counsel for the Secretary stated that she explained to counsel for Ledcor her reasons for seeking the requested information and documents prior to taking any depositions. She argues that "depositions are expensive and, as a result, are not the most efficient way to obtain basic information" and "parties typically propound written discovery to provide them with not only the basic facts underpinning the citations and orders at issue, but also knowledge of the universe of persons with knowledge of those facts and the documents that contain information relevant to the Secretary's allegations and the responding party's defences." Sec'y Reply at 4.

In addition to raising the objections discussed above, Ledcor provided information regarding its most recent activities on all three benches. With respect to the Mid-Level Bench, Ledcor stated that it "most recently conducted active mining operations . . . from September 12 through September 23, 2016." Sec'y Mot., Ex. C, p. 8. "The most recent blasting took place . . . on September 1, 2016. Following the end of mining operations in the Mid-Level bench on September 23, 2016, a berm was placed at the entry point of the access road leading from the Lower-Level bench to the Mid and Upper Level benches." *Id.* Ledcor provided similar information with respect to the Lower Level Bench and the Upper Level Bench. *Id.* at pp. 10, 15.

I find that Ledcor did not provide any evidence to demonstrate an undue burden or expense. The Secretary asked for a history of all blasting, scaling, and barricading activity on the benches going back about six months prior to the issuance of the citation and orders in early October 2016. As a contractor at the mine, Ledcor's work was limited in scope and had been

going on, at most, for that six month period. The citation and orders allege that Ledcor was highly negligent with respect to the alleged violations and one of the orders alleges that the "mining methods being used in the 99 Pit do not ensure the stability of the high walls." Order No. 8989355, Docket No. WEST 2017-270-M. As a consequence, the parties are likely to seek to introduce evidence at the hearing about mining methods and highwall stability for a period of time before the date of the issuance of the citation and orders. I find that a six month history of the activities at the highwalls is relevant to the issues in the case.

"A party objecting to a discovery request on the basis of burden or expense must demonstrate such a burden or expense." *Greyeagle Coal Co.*, 35 FMSHRC 3321, 3324 (Oct. 2013) (ALJ) (citing *Rail Link, Inc.*, 20 FMSHRC 181, 182–83 (Feb. 1998) (ALJ)). Ledcor has not demonstrated how or why obtaining and providing the information requested would be burdensome or expensive. I also agree with the Secretary, that Ledcor cannot tell the Secretary that it should obtain the information in a deposition. For the reasons set forth above, the Secretary's motion is **GRANTED** with respect to this issue. Ledcor is **ORDERED** to provide more complete answers to Interrogatories 7, 10 and 16.

D. Respondent Provided Improper and Internally Inconsistent Responses to Requests for Admissions 5 through 14.

The Secretary states that he propounded Requests for Admissions 5 through 14 in order to verify the accuracy of statements that the MSHA inspector recorded in her notes at the closeout conference on October 13, 2016. The MSHA inspector attributed the statements set forth in the Requests for Admissions to specified Ledcor management officials who discussed the merits of the subject citation and orders at the closeout conference. For example, Request 5 asks Ledcor to admit that during the closeout conference, Ledcor's project manager stated that the hazardous conditions at the Mid-Level Bench "shouldn't have been allowed to exist." Sec'y Mot., Ex. D p. 4. Ledcor's response to that request for an admission is as follows:

> Denied. After making a reasonable and diligent inquiry, Ledcor lacks knowledge or information sufficient to confirm that the quoted statement taken from the inspector's notes is true or accurately reported.

Id. Ledcor's responses to the other requests for admission are the same. The Secretary maintains that under the guidance provided by Fed. R. Civ. P. 36(a)(3) and (4), Ledcor's responses are insufficient.

Ledcor first argues that requests for admissions should be used to establish admissions of facts there are not in dispute rather than to elicit facts and information from the opposing party. Admissions should be framed to narrow the range of issues for trial. The subject requests for admissions do not seek to conclusively establish the truth of the matters asserted for the purpose of narrowing the issues at the hearing, but only to establish that certain oral statements were made. These alleged statements were made a year before the request for admissions were propounded and were recorded only in the notes of the inspector. Ledcor complied with the

requirements of the Federal Rules because, after making a reasonable inquiry, it could not admit that the alleged statements were made. Fed. R. Civ. P. 36(a)(4).

In his reply, the Secretary argues that the contents of the statements allegedly made by Ledcor's employees are relevant to the factual and legal issues in the cases. He observes that these individuals also took notes during the closeout conference. Mine operators regularly keep records of the discussions in closeout conferences so Ledcor should have referred to these notes to respond to the requests for admissions.

Ledcor represents that it made reasonable and diligent inquiries in responding to the admission requests. Ledcor's response was signed by its attorney Nicholas W. Scala, who is an officer of this court. Commission Procedural Rule 6(b) requires that Mr. Scala certify that he has read the document and "to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact[.]" 29 C.F.R. § 2700.6(b). Thus, I accept Mr. Scala's representation that Ledcor made a reasonable and diligent inquiry into each admission request and it is unable to admit that the subject statements were made.

The requests for admission are quite specific and are in quotes. For example, Request 8 asks Ledcor to admit that its safety manager and its project manager stated at the closeout conference that they agreed with the inspector's statement that "[m]anagement has failed to correct hazardous condition that they have known about for approximately five months." Sec'y Mot., Ex. D, p. 5. This is a very specific admission request and it is unlikely that any attendee from management would have included such a statement in his notes. Using the Federal Rules as a guide, I find that Ledcor complied with the Secretary's request for admissions. Fed. R. Civ. P. 36(a)(4). Consequently, the motion to compel is **DENIED** with respect to this issue.

ORDER

Ledcor CMI, Inc. is **ORDERED** to comply with this order to compel, as set forth in Parts A, B, and C of this Order by no later than **April 23, 2018.** The parties are reminded that the hearing in these cases is scheduled to commence on May 30, 2018.

Richard W. Manning
Administrative Law Judge

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