

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

Office of Administrative Law Judges  
721 19th Street, Suite 443  
Denver, CO 80202-2536  
303-844-3577/FAX 303-844-5268

June 2, 2016

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
on behalf of JACOB HAMILTON,  
Complainant

v.

AMERICAN MINING AND  
TUNNELING, LLC  
Respondent

DISCRIMINATION PROCEEDING

Docket No. WEST 2016-326-DM  
MSHA No. WE MD 2016-04

Fire Creek Mine

Mine ID 26-02691 A4880

**ORDER CONCERNING PROPOSED TESTIMONY OF STEVEN ROGERS**

The hearing in this discrimination case is set to commence on June 22, 2016. In my notice of hearing, I required the parties to exchange witness and exhibit lists by no later than June 8, 2016. Under Commission Procedural Rule 56(e), discovery should have been completed by June 2, 2016. 29 C.F.R. § 2700.56(e). By email on May 31, Joseph Lake, counsel for Complainant, asked that the discovery deadline be extended until June 10 because certain individuals could not be scheduled for deposition until the week of June 6. Donna V. Pryor, counsel for Respondent, does not oppose this extension of the discovery period.

Late in the day on May 31, Mr. Lake also disclosed via email that he intends to call an expert witness at the hearing and that his written report would be produced later this week. Ms. Pryor, via email, opposed the request because it is only about twenty-two days until the hearing, discovery is coming to a close, and she needs this time to prepare her case. She contends that the Complainant should have disclosed the identity of this potential witness in response to discovery much earlier so that she could have scheduled his deposition in May. This delay does not give her much time to schedule a deposition and determine whether Respondent needs to call an expert witness.

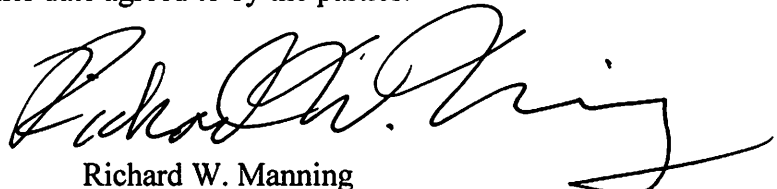
I scheduled a conference call for June 1. During the call, Jessica Flores, counsel for Complainant, advised me that the expert she wants to call is Steven Rogers, a safety and health specialist with MSHA in the Vacaville, California, office. He would be called as a rebuttal witness in response to expected testimony from Respondent's witnesses that certain actions taken by Jacob Hamilton, the complainant in this case, were unsafe and that he was discharged for those unsafe actions. Rogers was not present at the mine during the disputed events and, as I understand it, he would testify generally about the safety of Hamilton's actions when he discovered drill holes underground that had not been shot during the most recent round of blasting.

Ms. Flores stated during the conference call that she first learned of this defense during depositions of Respondent's witnesses taken in mid-May. She also stated that she had planned

on using a different MSHA safety specialist as a rebuttal witness but he became unavailable because of a death in the family. Counsel stated that the process of finding a second safety specialist to testify contributed to the delay.

Ms. Pryor objected to Complainant's request during the call primarily because of the delay in notifying her that an expert would be called. She had requested the names of potential witnesses during discovery. She stated that she will not be able to depose Mr. Rogers next week because of scheduling issues but that she could depose him on June 14 in Denver, if I grant the Complainant's request. Counsel did not indicate whether she will now be seeking to call an expert on Respondent's behalf.

It is **ORDERED** that Complainant shall be permitted to call Steven Rogers as a rebuttal witness at the hearing on June 22-23, 2016. Although the disclosure of this witness is later than is optimal, given the sequence of events, the delay was not unreasonable. The hearing is three weeks away, which gives the parties time to prepare for hearing.<sup>1</sup> At the hearing, Complainant will be required to qualify Rogers as an expert in his field before he will be allowed to testify. Although Commission judges are not bound by the Federal Rules of Evidence, I will use them as a guide. Fed. R. Evid. 702 *et seq.* Complainant **SHALL** serve Rogers' written report on counsel for Respondent via email by no later than 5:00 p.m. Mountain Time on Friday, June 3, 2016. Counsel for Complainant **SHALL** make Steven Rogers available for deposition on June 14, 2016, in Denver, Colorado, or on another date agreed to by the parties.



Richard W. Manning  
Administrative Law Judge

Distribution (Via email and USPS):

Jessica M. Flores, Esq., and Joseph Lake, Esq., Office of the Solicitor, U.S. Department of Labor, 90 7<sup>th</sup> Street, Suite 3-700, San Francisco, CA 94103-6704

Donna V. Pryor, Esq., Jackson Lewis, 950 17th Street, Suite 2600, Denver, CO 80202-2828

RWM

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<sup>1</sup> I also note that in *Mark Gray v. North Fork Coal Corp.*, 35 FMSHRC 2349 (August 2013), the Commission reversed a judge's order excluding the testimony of late-identified expert witnesses and remanded the case back to the judge. The identities of the two proposed expert witnesses were not disclosed to the respondent until about 15 days before the hearing. Although that case raised issues not present in this case, the Commission held that "the exclusion of critical evidence is an 'extreme' sanction, not normally to be imposed absent a showing of willful deception or 'flagrant disregard' of a court order by the proponent of the evidence." 35 FMSHRC at 2360 (citations omitted).